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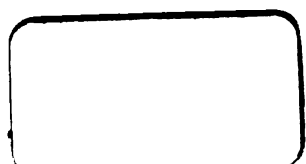
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REPORTS OF CASES

DECIDED IN THE

Gr. Bt.

HIGH COURT OF CHANCERY,

1859 to 1861,

BY

SIR RICHARD TORIN KINDERSLEY,
VICE-CHANCELLOR.

BY

C. STEWART DREWRY
(OF THE INNER TEMPLE),

AND

J. JACKSON SMALE
(OF LINCOLN'S INN),

ESQUIRES, BARRISTERS AT LAW.

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ERRATA.

Page 518, in 21st line, for "*exclude*" read "*include*."

„ 575, in marginal note, for "*7th section*" read "*27th section*."

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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR

SIR R. T. KINDERSLEY.

1859.
Dec. 4, 6 & 23.

*Specific Per-
formance.
Vendor and
Purchaser.*

DOWSON v. SOLOMON.

ON the 8th of June, 1858, the unexpired term of thirty-three years in a house and premises at *Champion Hill, Surrey*, held under a lease from the master, wardens, &c. of *Dulwich College*, was sold by auction subject to certain particulars and conditions of sale, and the Defendant *Leon Solomon*, having been declared the purchaser at such sale, signed the memorandum of agreement for the purchase, and paid the deposit on the purchase-money.

By the conditions subject to which the property was sold, it was provided that the purchaser should pay to completion did not take place till the 26th of August. The purchaser then discovered that the vendors had renewed the insurance, which expired on the 24th of June, for one month only, so that the property became uninsured on the 24th of July, and thereupon became forfeited to the lessors. On the 7th of September, the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and the purchaser refusing to complete, they filed a bill for specific performance.

Held, that although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the Court would not decree specific performance, and the bill was dismissed, but without costs.

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DOWSON
v.
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the vendors the remainder of his purchase-money and complete the purchase on the 20th of July, 1858, and should be let into possession from that day, and that up to that time all outgoings should be cleared by the vendors, but that if the purchase should not be completed on the day fixed for completion the purchaser should pay 5*l.* per cent. on his purchase-money until the same should be paid, and should not be entitled to compensation on account of such delay. It was also provided by the conditions that the title of the lessors should not be inquired into, and that "the receipt for the last periodical payment of rent reserved by the lease shall be taken as satisfactory evidence of the performance of all the covenants therein contained on the part of the lessee or his assignee or assignees up to the completion of the purchase," and that "as the lease may be seen before the sale the purchaser will be considered to have notice of the covenants." It was further provided that the purchaser should deliver his objections and requisitions on the title within ten days next after the delivery of the abstract, and that subject to any objections and requisitions thereon then made the title should be deemed to have been accepted, and that in that respect time should be of the essence of the contract. Tenants' fixtures, garden utensils, &c., &c., according to an inventory to be produced at the sale were to be taken at a valuation in the usual way. It was also stated in the particulars of sale that the lease from *Dulwich* College, under which the property was held, might be seen at the office of the vendors' solicitors.

The abstract of title was delivered, and the purchaser sent in his objections and requisitions on the title within the times fixed by the conditions of sale, and the objections and requisitions having been answered, the pur-

chaser ultimately accepted the title some time before the 14th of July, 1858. On the 23rd of July following the draft conveyance of the premises was forwarded by the purchaser's solicitors to the vendors, and was returned approved of by them on the 27th of July, and on the 3rd of August the engrossment was finally forwarded to the vendors' solicitors.

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Owing to delays which had occurred in ascertaining the value of the fixtures, &c., the purchase was not completed on the 20th of July, the day fixed for completion, but a meeting was appointed for the 26th of August to complete the purchase.

Among the covenants contained in the lease of the premises from *Dulwich* College was a covenant, on the part of the lessee, to keep the premises insured against fire, and the lease contained the usual clause, that in the event of the non-performance of any of the covenants the landlord might re-enter and avoid the lease.

The vendors were trustees for sale under a will; and in the month of June, Mr. *Dowson*, one of the trustees, and who it appeared acted for himself and his co-trustees in the matter, went to the office of the insurance company where the premises had been insured to pay the premium on the policy, and finding that it would expire on the 24th of June, and expecting that the purchase would have been completed on the 20th of the following July, the day fixed for completion, he renewed the policy for one month only, which month would expire on the 24th of July. Mr. *Dowson* did not give the purchaser, or even his own co-trustees, notice that he had renewed the policy for only one month, and on the 24th of July, 1858, the policy expired.

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v.
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When the parties met for completion on the 26th of August, 1858, the purchaser applied for the receipt for the last premium on the policy of insurance, and on ascertaining that the policy had dropped, he refused to complete on the ground that the lease from *Dulwich* College was forfeited by reason of the breach of covenant, but the purchaser subsequently offered to complete if the vendors would obtain from *Dulwich* College a waiver of the forfeiture. This, however, the vendors refused to do.

The vendors' solicitors then offered that either the vendors or the purchaser should insure the premises without prejudice to any questions between them; but the purchaser refused to take either course, and on the 7th of September following, the purchaser gave the vendors notice that his contract for purchase was at an end, and demanded the return of his deposit-money.

The vendors subsequently effected a new insurance of the premises, and applied for and obtained from *Dulwich* College a waiver of the forfeiture for the breach of covenant, and on the 1st of November, 1858, called upon the purchaser to complete. The purchaser, however, adhered to his notice of the 7th of September to avoid his contract, and brought his action to recover his deposit-money.

The vendors thereupon filed their bill for the specific performance by the purchaser of his contract of the 8th of June, 1858; and for an injunction to restrain the proceedings at law which had been instituted by him to recover his deposit-money. On the 2nd of December, 1858, an injunction was granted restraining the Defendant from proceeding with his action on an undertaking

by the Plaintiffs to abide by such order, with respect to that money, as the Court might direct.

The cause now came on to be heard.

It appeared that after the title had been accepted the purchaser desired to have possession of the garden, and an agreement was entered into between the purchaser and the vendors that he should have possession of the garden, and have his gardener in; but it was agreed that while the matter remained uncompleted the gardener should be considered the servant of the vendors.

A considerable amount of evidence was adduced on both sides with regard to certain acts of ownership, alleged to have been exercised over the property by the purchaser, and also as to whom the delay in completing the purchase was to be attributed to.


Mr. *Baily* and Mr. *Forster* for the Plaintiffs.

The purchaser accepted the title on the 30th of June, and he cannot now refuse to complete. The conditions of sale provided that all outgoings up to the 20th of July were to be borne by the vendors, and that was notice to the purchaser that after that date he would have to make all payments in respect of the property. Moreover, the conditions stated that the lease of the property might be seen by the purchaser prior to the sale, and that the purchaser would be taken to have notice of the covenants contained in the lease. The purchaser, therefore, must be held to have had notice of the covenant to insure. From the day fixed for the completion the property was at the purchaser's risk, though the purchase happened not to be completed on that day; *Paine v. Meller* (a).

(a) 6 Ves. 349.

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The purchaser has had possession of the premises, and exercised acts of ownership, and he cannot now repudiate his contract; *Gregory v. Mighell* (a).

The condition of sale, providing that the receipt for the last payment of rent shall be taken to be satisfactory evidence of the performance of all the covenants, precludes the purchaser from raising any objection on the ground of the dropping of the policy of insurance.

Sir *Hugh Cairns*, Mr. *Bazalgette*, and Mr. *Charles Hall* for the Defendant.

The acceptance of title operates as a waiver of those defects only which appear on the abstract, and if a purchaser can show defects in the title *aliunde*, the Court will not compel specific performance of his contract. In the present case the defect in the title occasioned by the dropping of the insurance did not exist at the time when the Defendant accepted the title.

From the date of the contract the vendors become trustees *sub modo* for the purchaser; and it is only when they deliver up possession of the property that they divest themselves of the trust. They are not dry trustees merely, but are charged with the duty of keeping up the title to and preserving the trust property so far as the nature of the property will permit.

With regard to the time fixed for completion. When a time is fixed for completion, the question arises whether time is to be deemed as of the essence of the

contract. If it is neither expressly declared nor to be inferred from the conditions that the time fixed for completion is of the essence of the contract, and that time is allowed to pass over without any stipulations respecting the delay, such delay amounts to a waiver of the condition as to the time for completion, and the contract is treated in equity as if such condition had never existed; and in such a case the time fixed for completion cannot be appealed to as in any way affecting the rights of the parties, except so far as relates to any question of interest.

The vendors might have given the purchaser notice that they intended to adhere to the time fixed for completion, or, in letting that time pass over, might have made stipulations throwing the risk of the property on him; but not having done so, the property remains at their risk.

The purchaser never had possession of the property, and therefore was not in a position to insure; at all events the vendors have done so unusual an act in insuring the property for one month only, that the Court will not decree specific performance.

They cited *Warren v. Richardson* (a); *Const v. Barr* (b); *Attorney-General v. Sitwell* (c); *M'Culloch v. Gregory* (d); *Sugd. Vend. & Pur.* (e); *Wall v. Bright* (f); *Sherwin v. Shakspear* (g); *Seton v. Slade* (h); *Price v. Macaulay* (i); *Lewin on Trustees* (k); *Wilson v. Chapham* (l); *Acland v. Gaisford* (m).

(a) 1 Younge, 1.

(b) 2 Mer. 57.

(c) 1 Y. & Coll. Ex. 559.

(d) 1 K. & J. 287.

(e) Page 249.

(f) 1 Ja. & W. 500.

(g) 5 De G., M. & G. 517.

(h) 7 Ves. 265.

(i) 2 De G., M. & G. 339.

(k) Page 174 (3rd edit.)

(l) 1 J. & W. 36.

(m) 2 Mad. 28, 32.

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v.

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Mr. *Baily* in reply.


The VICE-CHANCELLOR.

This is a suit by vendors for specific performance of a contract to purchase a certain leasehold house and premises. The Defendant, the purchaser, insists that by reason of the dropping of the insurance the title became defective, and that therefore the contract is at an end ; or, at all events, that it is a case in which the Court will not under the circumstances decree specific performance.

I will first dispose of the point raised by the Plaintiffs that the Defendant, whatever might be the opinion of the Court on the rest of the case, was bound to complete the purchase because he had entered into possession. It appears to me that there is no ground for such a contention. The title having been accepted, and, there being no reason to doubt that the contract would be ultimately completed, the Defendant desired to have possession of the garden ; and he was allowed to put his gardener in with a view to making certain improvements. But he was never allowed to have possession of the house ; and it was agreed that the gardener whom he had put in should, so long as the matter remained uncompleted, be considered as the servant of the vendors. It appears to me, therefore, that there has been no such taking possession under the contract as entitles the Plaintiffs to say, that on that ground alone, without reference to the other points in the case, there must be a decree for specific performance.

The main ground, and one raising a question of considerable difficulty, upon which I am unable to find

any direct authority to guide me, is, what is the effect of the dropping of the insurance after (though very shortly after) the day fixed for the completion of the contract, and after the title had been accepted by the purchaser. The second condition of sale fixed the 20th of July for the completion of the contract; and by that condition all outgoings up to that time were to be cleared by the vendors. On that day, therefore, according to the intention and agreement of the parties, the vendors were to convey the property to the purchaser on receiving the purchase-money. The effect of such a contract is in my opinion this: that from the date of the contract the vendors became trustees of the property, the beneficial interest remaining in themselves until the 20th of July, the day fixed for completion; and from that day (supposing the contract should happen not to be then completed), the legal estate still remaining in the vendors, they were trustees for the purchaser, in whom the beneficial interest then was from that day, and thus the relation of trustees and *cestuis que trust* was constituted between them. But it must be observed that this relation of trustee and *cestuis que trust* is not absolute and complete; it is conditional and *sub modo*. It is conditional on the vendors making out a good title, which they may never be able to do, and it is also conditional on the purchaser paying his purchase-money, which he may never be able to do. The relation of trustee and *cestuis que trust* is so far constituted that the purchaser has become in equity the owner of the premises. As Lord Eldon observed in *Paine v. Meller* (a), "the premises are vendible as his" (that is, as the purchaser's), "chargeable as his, capable of being encumbered as his, they may be devised as his, they may be assets,

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(a) 6 Ves. 352.


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&c., they would descend to his heirs." On the other hand, if the vendor were absolutely and to all intents and purposes a mere trustee of the property, it would not pass by a general devise in his will of all his estates in trust to sell; and yet it was decided by Sir *Thomas Plumer* in *Wall v. Bright (a)*, that the property so contracted to be sold would pass by such a devise in the will of the vendor, and for this reason, that it is still possible the contract may never be completed. It is therefore impossible to assume that the rights and obligations of the vendor and purchaser, while the contract remains incomplete, are necessarily the same in all respects as in the case of an ordinary trustee and *cestui que trust*. If the title has been accepted by the purchaser (as in this case it was some time prior to the 14th of July), one of the contingencies, and no doubt the principal contingency, on which it would depend whether or not the contract will be completed, has been removed; but there still remains some degree of uncertainty whether the contract will ever be quite completed; so that the relation of trustee and *cestui que trust* still is not absolutely and completely constituted: and therefore you cannot with implicit confidence reason merely from the law which would prevail as between a mere ordinary trustee and *cestui que trust*.

Looking then at these parties as being to a certain extent trustees and *cestuis que trust*, but being in truth vendors and purchasers, the question is this, how long did it continue to be the duty of the vendors under these circumstances to keep up the insurance, and to perform the other covenants in the lease so as to prevent a forfeiture? (I need not refer to the other covenants, it is quite sufficient to take this one, which is the covenant

(a) 1 Jac. & Wal. 500.

in question ; for whatever applies to this covenant would apply to any of the others.) That up to the 20th of July, the day fixed for the completion of the contract, it was their duty to keep up the insurance, and not only to do so, but to do it at their own expense, I have no doubt ; for by the express terms of the contract the vendors were to clear all outgoings up to that day. But the question is, was it their duty to do so after the day fixed for the completion of the purchase ? And, first, was it their duty to keep up the insurance after that day at their own expense ? Now, to try this question let me suppose that the purchaser knew (as he did know) that by the terms of the lease the estate was liable to forfeiture if the insurance dropped. He knew that perfectly well at least from the time of the delivery of the abstract ; but let me suppose he not only knew that, but that he also knew on what day the insurance would expire, and that he refused to provide the money to pay the premiums for renewing the policy, insisting that the vendors were bound to pay it out of their own pockets ; while on the other hand the vendors offered to renew the policy if the purchaser would supply the money ; the question would be—what ought to be the view of the Court upon such a state of things ? If such were the state of circumstances, I should not hesitate to decide that question against the purchaser. Not only was the purchaser, in my opinion, so far the owner, at least from the 20th of July, the day fixed for the completion of the contract, as that the property was thenceforth at his risk, but by the express terms of the contract the vendors were to clear all outgoings up to that day, which necessarily implies that after that day the vendors were not to be held liable for any outgoings. Therefore upon the dry question by whom the expense of renewing the insurance after the 20th of July ought to have been borne,

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I am of opinion that it ought to have been borne by the purchaser. If so, the question between the parties seems to resolve itself into this ; was it so far the duty of the vendors to inform the purchaser, that is voluntarily to give him the information, of the day on which the existing policy would expire, that their omission to do so, followed by the dropping of the insurance, entitles the purchaser to say that there is an end of the contract? That seems to me to be the point into which the whole question resolves itself as between these parties ; and I think the question must be tried upon the same grounds as if upon the dropping of the insurance the lessors had actually entered for the forfeiture and avoided the lease.

Now I do not think that it can be laid down as a general proposition that the omission of the vendors to give that information, followed by a forfeiture (if it had been so), is of itself sufficient to avoid the contract. To try that general question, upon which I can find no direct authority, let me divest the present case of its peculiarities, and let me suppose that at the time of the contract on the 8th of June there had been an existing policy which had (say) six months to run, and that for some reason, not arising from any difficulty as to the vendors' title (which the purchaser had accepted), the completion had been delayed beyond the expiration of those six months. The purchaser knew just as well as the vendors of the covenant in the lease to keep the premises insured, and that a breach of that covenant involved a forfeiture of the term. That was all apparent on the face of the abstract which had been in his hands ever since about the 16th of June, and which had been carefully examined by his legal advisers. The purchaser had accepted the title shown by that abstract

at least as early as the 14th of July, and he knew or he must be taken to have known that at least from the 20th of July, the day fixed for completion, the property was at his risk, there being nothing which could then prevent the ultimate completion of the purchase but his own failure to pay his purchase-money, the title having been accepted. He knew further, or he must be taken to have known, that it was for him to provide the money necessary to pay the premium on renewing the policy of insurance. He had become in equity the owner of the property. Was it not then, to say the least, extreme negligence on his part to make no inquiry and take no trouble on the subject? Though he had become the equitable owner of the property he did not give himself the trouble to inquire when the policy would expire. If he had inquired of the vendors and had received from them no information, or false information, as to the time at which the policy would expire, then indeed the case would assume a very different aspect. But having himself forgotten or neglected to make the inquiry, does it lie in his mouth to complain that the vendors forgot or neglected to give the information voluntarily? I am not saying that in such case there would be no negligence on the part of the vendors; but the question which I am at this time considering is this, whether it can be laid down as a general proposition applicable to all cases (applicable for example to such a case as I have been supposing), that the omission of the vendors to inform the purchaser of the day on which the insurance would expire, the purchaser making no inquiry on the subject, is of itself sufficient to avoid the contract. I am not prepared to lay down such a general rule. If the relation of trustee and *cestui que trust* were so constituted between these parties from and after the 20th of July, as that all the reasoning applicable to the case of pure

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trustee and *cestui que trust* would be applicable to them, I apprehend there can be no doubt that it would have been the duty of the *cestui que trust* to have provided the trustee with money to keep up the insurance if he had wished it done, which of course he would to prevent a forfeiture; and although the trustee would be much to blame who omitted to give voluntarily to the *cestui que trust* all the information he possessed in relation to the matters, I cannot say that the omission of the trustee to give that information would be a reason why that trustee should be liable to make good the value of the property to the *cestui que trust*. There may have been negligence in each, certainly as much negligence in the purchaser as there was in the vendor, and infinitely more inexcusable and extraordinary negligence, considering that from the 20th of July at all events the purchaser was the beneficial owner of the property, and one would have thought that for his own interest he would have been more vigilant, and more attentive to a question of the greatest importance with reference to the very existence of the property which he had agreed to purchase.

But there are in the present case certain special and peculiar circumstances which lead me to the conclusion that it is one of those cases in which the Court ought not to decree specific performance. The vendors knew, at least, Mr. *Dowson* (who seems to have been the one of the trustees for sale, who acted for the others) knew, that the policy which existed at the date of the contract would expire on the 24th of June, that is not quite a month before the day fixed for the completion of the purchase; and Mr. *Dowson*, knowing that it was the duty of the vendors to renew, went to the insurance office and renewed the insurance; but instead of the ordinary policy for twelve months, he renewed by taking

a policy for one month only, so as to carry the insurance on to the 24th of July, that is, only four days beyond the day fixed for the completion of the contract, expecting, no doubt, that the completion would take place on that day, and probably intending on that day, when they met to complete, to give the information to the purchaser, who would then have just time enough to renew the insurance. Now, I see no reason to suspect that Mr. *Dowson* intended any harm to the purchaser; indeed he could have no motive for that. I assume according to his own representation that he had completely forgotten the matter, and unfortunately he not only forgot to mention the matter to the purchaser, but he also forgot to mention it to his own co-trustees, or to the solicitor for the vendors. This conduct, however unintentionally on the part of Mr. *Dowson*, in effect operated as a trap into which the purchaser would fall if he should omit to exercise due diligence; and unfortunately the purchaser fell into it. I do not mean to say that the vendors were bound to renew for a year; but if in renewing they thought fit to run the matter so fine as to cause great risk to the purchaser, they must not be surprised if a Court of Equity refuses to lend them its assistance against the purchaser. Moreover, when the fact of the dropping of the insurance was discovered on the 26th of August at the meeting which was held for the purpose of completion, the purchaser offered still to complete the purchase if the vendors would procure a letter or document from the lessors to the effect that they would not take advantage of the forfeiture. This proposal was unfortunately declined by the vendors; and on the 7th of September the purchaser sent them a written notice declining altogether to complete the contract. The vendors it is true did afterwards think better of the matter, and ultimately effected

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a new insurance, and procured from the lessors a letter waiving the forfeiture. But the purchaser adhered to his notice of the 7th of September, and therefore the waiver was too late. Under all the circumstances I am of opinion, that I ought not to assist the vendors by decreeing specific performance; and therefore the bill must be dismissed, but without costs.

Dec. 19.

*Fund in Court.
Payment out to
defaulting
Parties.*

BRANDON v. BRANDON.

Although the Court will not order payment to a defaulting receiver of his share in the estate under administration until he has made good his default; yet the same principle does not apply as against his assignees to the case of a share devolving on such defaulting receiver in his character of

THIS was a petition seeking the payment out of Court of 725*l.* 11*s.* 9*d.*, which had been paid to an account entitled, "The account of the assignees of *William Barnard John Brandon*, a bankrupt, and the Plaintiff," and the question was whether such sum belonged to the assignees of the bankrupt, or to the Plaintiffs in the several suits, as representing and on behalf of the parties interested in the estate under administration; and whether it was liable in like manner with other shares and interests to which the bankrupt, who had been a defaulting receiver, was beneficially entitled, to recoup the estate in respect of his defaults as such receiver.

next of kin of a person originally entitled to a share in the same estate, notwithstanding that such share may have been paid into Court with the assent of the personal representative of the person so originally entitled to the share, but in the absence and without the assent of the assignees of such defaulting receiver.

The suit of *Brandon v. Brandon*, and other suits in which the petition was entituled, were instituted for the administration of the estate of *Samuel Brandon*. Various interlocutory orders were from time to time made in these suits, and *William Barnard John Brandon* was declared entitled to certain portions of the freehold estates as the testator's heir-at-law; and he also acquired certain other shares in the testator's estate by purchase.

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In August, 1830, *William Barnard John Brandon* was appointed sole receiver, and recognizances were entered into by him and his sureties in the usual way.

By an order dated the 23rd of April, 1839, *William Barnard John Brandon* was removed from being receiver; and by a report made in pursuance of that order, and dated the 8th day of July, 1840, a sum of 6,277l. 16s. 5d. was found due from him as such receiver, and in November, 1840, *William Barnard John Brandon* having previously (on the 14th of January, 1840) been declared bankrupt, his sureties were ordered to pay a sum of 4,415l. 2s. 7d. into Court, which was accordingly done by them in April, 1841.

Upon the death of *Mary Ann Long*, one of the parties interested in certain portions of the testator's estate, in January, 1838, *William Barnard John Brandon* became entitled as one of her next of kin to 725l. 11s. 9d.; and this sum was, on the 23rd of July, 1858, on the petition of (amongst others) the administrator of *Mary Ann Long*, directed to be paid into Court, to "The account of the assignees of *William Barnard John Brandon*, a bankrupt, and the Plaintiff," and was paid in accordingly. The order for the payment of this fund

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into Court to this account was made without the concurrence or knowledge of the assignees, who were not parties to the suit, and were not served with the petition upon which such order was made.

By an order made on petition presented by the Plaintiff and other persons, and on further directions, in March, 1857, it was declared that the shares and interests in the testator *Samuel Brandon's* estates, to which on the 23rd of April, 1839, the Defendant *William Barnard John Brandon* was entitled, either as heir-at-law or by purchase, were liable and bound to make good to the other parties interested in the testator's estates the losses occasioned to the estate by his defalcations as receiver; and in the next place to make good to the sureties the amounts they had been ordered to pay into Court.

The assignees of *William Barnard John Brandon* now presented their petition to have the money paid out to them.

Mr. *Greene* and Mr. *Hardy*, for the Petitioners, submitted that the assignees were entitled to the fund, inasmuch as the principle laid down by the Court on the former occasion, and the equities thereby enforced, had reference only to the estate under administration in the suit which was the estate of *Samuel Brandon*, whereas the fund the subject of the present petition formed part of the estate of *Mary Ann Long*, which was not being administered by the Court: and although it had found its way into Court, yet it was paid in on a petition to which the assignees were not parties, and therefore that their rights could not be in any way affected thereby.

Mr. *Baily* and Mr. *Wood*, for the Plaintiffs.

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The same principle applies as well to the share to which *William Barnard John Brandon* was entitled as next of kin of *Mary Ann Long*, as to the shares to which he was entitled in April, 1839; and therefore the Court cannot pay them out to the assignees of *William Barnard John Brandon*, the personal representative of *Mary Ann Long* not making any claim to the same.

The equity is a personal equity, and it is clear that if the defaulting receiver himself were present the Court would not pay to him anything until he has made good his defaults, and his assignees cannot stand in any better position than he himself would have stood.

In the case of a trustee of a chose in action for a married woman, if he chooses to pay to the husband he will be safe in doing so, and will thereby deprive the married woman of all power to assert any claim, but if he refuses to do so, or in the event of its being necessary for any reason to come to this Court, the Court will not order the money to be paid to the husband, except upon the equitable terms of his making a settlement. So in the present case the fund having come into Court, no matter how, the Court will not part with it without seeing that equity is done between the parties.

Mr. *Glasse* and Mr. *Cracknall*, for the Sureties in the same interest with the Plaintiffs.

Mr. *Greene* was not called upon for a reply.

The VICE-CHANCELLOR.

As a general rule, if the Court is administering funds

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in a suit among various parties to that suit, one of whom is a defaulter towards the estate which is being administered, the Court will not, in distributing the funds, let that person have the share to which he is entitled out of Court until his default has been made good; and it goes so far as to prevent his having payment of his costs until he has made good his default.

On a former occasion, *William Barnard John Brandon* being entitled to some share in the estate under administration, the Court in administering that estate would not let him, or any person claiming under him, have that share out of Court until he had made good his default.

The fund which is the subject matter of the present petition in the first instance belonged to *Mrs. Long* in respect of her share in the testator's estate, and that lady having died, her legal personal representative was entitled to receive it as part of her estate; and the Court would in the ordinary course direct it to be paid to him. That is the strictly regular and usual course; although sometimes, at the request of the next of kin, and on the representation of the personal representative that it is a clear fund, the Court has allowed payment to be made direct to such next of kin. Had the usual and regular course been taken, there could have been no ground for the contention that there was any equity on the part of the sureties, or of the persons interested in the testator's estate, for insisting upon having the share of *Mrs. Long's* estate which had come to *William Barnard John Brandon* made liable to their claim in respect of the losses occasioned by the default of *William Barnard John Brandon*.

The only ground on which the petition is opposed is that the executor of *Mrs. Long* has admitted the fund to be a clear fund, and has obtained an order to pay it into Court; and that, being in Court, it has become liable to the equities existing as against *William Barnard John Brandon*, and that his assignees cannot be in any better position than he would have been had he himself been asking for the funds. If the assignees of *William Barnard John Brandon* had concurred in the application for the payment of this fund into Court, or had even been present when that order was made, such a contention might perhaps have been raised; but they were not before the Court upon the occasion when that order was obtained.

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The question then comes to this:—Is the act of the personal representative of *Mrs. Long* in the absence of the persons entitled to the share, in paying the fund into Court, to render it liable to a claim to which it would not otherwise have been liable? How can the act of the executor of *Mrs. Long*, in the absence of the persons beneficially interested, render it liable? This case is very different from the former case, in which I decided the share of the bankrupt to be liable. In that case the only way of getting at the fund was to come in the regular course to the Court, and ask for it as the bankrupt's share of the estate under administration in the suit; but in the present case the act of the legal personal representative of *Mrs. Long* was not in the regular course, and therefore, being done in the absence of the persons beneficially entitled, is not binding. The fund having been paid into Court, though irregularly, it was necessary for the assignees to apply to have it paid out to them. Such an act is not an acquiescence in the propriety of paying it into Court,

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nor is it necessary that instead of applying for it to be paid to themselves, they should go through the form of asking that it might be paid over to the legal personal representative of Mrs. *Long*, in order that such representative might pay it over to them. It appears to me that the form of this petition is proper; and that the fact that it is the assignees who are so applying, does not alter the principle which would have applied to the case if the petition had been presented by the personal representative of *Mary Ann Long* to have it paid out to him.

I think that the distinction is broad and obvious between this case and the case where the defaulter was a purchaser of shares in the estate of *Samuel Brandon*, which was under administration. The very ground of the equity which I administered with regard to those shares, when properly enunciated, excludes the case now before me. The Petitioners are entitled to that which they ask.

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15 & 16 Vict.
c. 86, s. 44.
*Substituted
Representation.
Insolvent Estate.*

DAVIES v. BOULCOTT.

THIS suit was instituted in the year 1838 to obtain payment of the arrears of an annuity charged by *William Alexander Madocks* upon property in *North Wales* by certain deeds of lease and release, dated in May, 1810, and secured by a term of 100 years, created thereby. The grantor of the annuity died in 1828 insolvent, and his executors having renounced probate, an administrator *ad litem* was appointed to represent his estate in the suit. A decree for sale of the property and for raising the arrears of the annuity had been made. The devisees of the property charged under *Madock's* will had disclaimed. All the other persons interested (including several subsequent incumbrancers) were before the Court.

Mr. *Osborne Morgan* now moved *ex parte*, under the 15 & 16 Vict. c. 86, s. 44, for the appointment of a personal representative of the estate of *Madocks* in the place of the administrator *ad litem*, who had died in 1853. He cited *Chaffers v. Headlam* (a), where in a somewhat similar case an order to the effect now asked for was made on motion on notice, and *Tarrett v. Lloyd* (b).

The VICE-CHANCELLOR made the order, subject to the production to the Registrar of an affidavit that after payment of the incumbrances out of the proceeds of the sale no surplus would be left, and upon notice being given to the next of kin of *Madocks* who were entitled to take out letters of administration to him.

Order made under the 44th section of the 15th & 16th Vict. c. 86, in a creditors' suit for the appointment of a person to represent the deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that, after payment of incumbrances out of the proceeds of the sale, no surplus would be left, and upon notice being given to the debtor's next of kin who were entitled to take out administration.

(a) 9 Hare, App. 46.

(b) 2 Jur. N. S. 371.

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*Scotch Law.
Case for
Foreign Court.
Statute.*

LORD v. COLVIN.

In a case of conflict of opinions on a question of pure and difficult Scotch law, the Court will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scotch Court. But it is matter of discretion in this Court. Mode in which the case is prepared.

IN this case a question now came before the Court of pure Scotch law ; viz., whether under Dr. *Cochrane's* trust disposition (in the nature of a will) his widow and sons were *homologati, or adopti*. On this question the opinions of numerous Scotch advocates were produced, and they were to a certain extent conflicting; and they raised a question of what constituted, in the view of the Scotch law, ignorance of their rights on the part of the widow and sons; on this question depended partly the question of homologation or adoption. It was contended on the one side that the knowledge of their rights must be positive individual knowledge. One of the opinions referred to what it termed *excusable ignorance*, and some of the opinions referred to and relied upon Scotch cases. In this state of things,

Mr. *Anderson*, for the Plaintiff, argued at great length that notwithstanding the 22 & 23 Vict. c. 63, the Court should decide on the evidence of Scotch lawyers before it. The Court, he said, had the facts before it; and the only question was as to the application of the Scotch law, on which it was furnished with the usual evidence.

Mr. *E. F. Smith* with him.

The counsel for the other parties (a) were not called upon.

The VICE-CHANCELLOR.

The more I consider this case, the more am I con-

(a) See vol. 4, p. 368.

firmed in the opinion I expressed at the outset of the argument, that I ought to avail myself of the power which the legislature has given me to refer the points of Scotch law here raised, to be decided by a Scotch Court ; although if I considered that by deciding the questions myself, I should have as much chance of doing justice between the parties as by sending the case to *Scotland*, I should not hesitate to save the parties the expense of sending them thither. With regard, however, to the expense, I do not see that it would be so great as has been stated ; because I must state all the facts of the case for the Scotch Court, and that Court will only have to decide the questions of law. The Act of Parliament leaves it to the Scotch Court to adopt such course for that purpose as it thinks fit ; but I apprehend that it will do what used to be done by the Courts of Common law in *England* on a case sent to them by the Court of Chancery. The case will be argued upon the facts contained in the statement settled by this Court, and the Scotch Court will give its opinion on all the questions of law, just as a Court of Common Law would have done under the old practice. What I have to consider is, in what way this question of homologation, or any other question of purely Scotch law, may be best decided, so that full justice may be done. It has been contended that as I have the evidence of the facts before me, and if that evidence is in any respects deficient, I have the means of obtaining more complete evidence, I ought to apply to the facts the principles of Scotch law, as they are stated by the Scotch lawyers who have been examined, and decide the questions myself. It may, however, be observed that there is no greater difficulty in getting the evidence together in order to obtain the decision of the *Scotch* Court, than there would be in getting it in order to enable me to

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decide the matter. It is further contended that I have the opinions of many Scotch lawyers to the effect that there can be no homologation, unless there be a competent knowledge of all the facts on the part of those who are alleged to have homologated. It appears to me that there is no perfect unanimity of opinion among the Scotch lawyers as to the kind and degree of knowledge which is necessary to homologation, whether it be actual personal knowledge, or whether knowledge may be *imputed* to the parties, without actual personal knowledge, and how far the Scotch Courts adopt the principle of our own Courts, that if a person has a knowledge of the facts of a case, he must be presumed to know the law, or that other principle which is in many cases acted upon by our Courts, that the knowledge possessed by a solicitor must be imputed to his client. And though, with regard to questions such as these, the witnesses on the one side, are perhaps, not in direct contradiction to those on the other, there is enough of variance to lead me to the conclusion that it is quite impossible for me, not being a Scotch lawyer, to decide the questions raised in this case in a satisfactory manner by attempting to apply the principles of Scotch law to the facts of this case. If the act of last session had not passed, I must have made the attempt, with whatever little prospect of success, but this Act of Parliament does away with the necessity for my doing so.

In the act (section 1) all that is necessary to be done in the Scotch Court is pointed out, namely, to present a petition to the Court to hear the case sent to them. The duty and discretion is given to this Court, to judge whether it is necessary or expedient for the purposes of justice in each particular case to ask for the opinion of a Scotch Court. I do not entertain the

smallest doubt that it is necessary and expedient in this case that I should adopt the course authorized by the act.

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I shall refer it to Chambers, to settle the case for the opinion of the Scotch Court, and I must settle the questions, which I must endeavour to shape in the language of the Scotch law.

Feb. 10.

Practice.
 10 & 11 Vict.
 c. 96.
 4th Order of
 10th June, 1848.
Trustee.
Petition.
Costs.

Re HUTCHINSON'S TRUSTS.

THIS was a petition presented under the Trustee Relief Act by the trustees of *Isaac Hutchinson*, deceased, who had paid certain funds belonging to his estate into Court under that act, and it prayed that such funds might be invested, and that inquiries might be directed to ascertain who were entitled as his next of kin.

The trustees served certain grand-nephews and grand-nieces whom they believed to be the next of kin of *Isaac Hutchinson* with the petition on the same day on which they gave their notice of the payment of the fund into Court.

It was alleged that *Mrs. Rudkin*, one of the grand-nieces who was represented by the same solicitors as the trustees, had requested the trustees to present this petition.

Although a trustee may under the 4th Order of the 10th of June, 1848, present a petition under the Trustee Relief Act as to monies paid in by himself, the Court, in making an order on such petition, gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund.

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Mr. *Archibald Smith*, for the trustees, in support of the petition.

Mr. *Bowring*, for four of the grand-nephews and grand-nieces who were supposed to be *Isaac Hutchinson's* next of kin, and Mr. *Robinson*, for other grand-nephews and grand-nieces of *Isaac Hutchinson*, submitted that the trustees were not the proper persons to present the petition, but that it was their duty upon paying the fund into Court to have given notice of their having done so to those entitled to the fund, and to have left it to them to apply to the Court. Instead of doing so however the first notice the *cestuis que trust* received of the fund having been paid into Court was their being served with the petition presented by the trustees. They therefore asked the Court to make an order upon the petition, but to give the grand-children the carriage of such order, and allow the trustees respondent's costs only; *Cazenau's Trusts* (a).

Mr. *Archibald Smith* in reply.

Under the 4th Order of the 10th of June, 1848, it is quite competent for the trustees to present the petition as representing the persons entitled to the fund, and in the present case the trustees have been requested by one of the *cestui que trust* to do so. Moreover, in the present case, although it is believed that the grand-nephews and grand-nieces who have been served with the petition are the next of kin, it is not yet certainly known who are the next of kin, and it was the trustees' duty to protect the fund and see that all the next of kin are before the Court. Under these circumstances the trustees have acted properly in presenting this petition.

(a) 2 Kay & J. 249.

The VICE-CHANCELLOR.

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I need hardly say that I entirely concur in the observations of the Vice-Chancellor *Wood* in the case referred to, of *Cazenau's Trusts* (a). The object of the act of parliament clearly was that a trustee or executor might by paying the fund into Court absolve himself from further liability, leaving it to the parties entitled to the fund to apply to the Court in such a way as they may think right for the purpose of having the fund dealt with by the Court. It is the duty of the trustee or executor, as soon as he pays the fund into Court, to give notice to the *cestuis que trust*, or those whom he believes to be the *cestuis que trust*, in order that those persons may be able to take steps to get the fund distributed; and the trustee or executor ought to abstain from applying to the Court himself unless there be some special ground for his taking that function upon himself. *Prima facie*, it is not his function to apply to the Court.

In this case the Petitioners are the trustees who paid the fund into Court. It is urged on their part that they cannot be certain who may be the next of kin; and although they believed the great nephews and nieces to be the next of kin, it is possible that they may be excluded by some persons nearer of kin; and, moreover, that they cannot be sure who all the grand-nephews and nieces are. The answer is, that this is not their concern. When they paid the fund into Court they had reason to suppose that the class of persons who would be the next of kin were composed of grand-nephews and nieces, and that there was nobody nearer; and they would have fulfilled their duty by simply paying the

(a) 2 Kay & J. 249.

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fund into Court and giving notice to those persons. Instead of doing so, contemporaneously with the notice of the fact of the money having been paid in, they served those persons with the petition; and thus those persons were precluded by the act of the trustees from doing that which the legislature intended them to be at liberty to do. The only special circumstance suggested is that one of the supposed *cestui que trust* requested the trustees to present this petition. But it appears that the solicitors of the person so doing are also the solicitors of the trustees; and I think it a great object to prevent anything like snatching at business in this Court. If this were allowed, what would prevent the solicitors of trustees or executors who had paid money into Court presenting a petition in every case? I do not think that the request of Mrs. *Rudkin* justified the trustees in presenting a petition; at all events it did not justify them in doing so without their having first given notice to the great nephews and nieces. The object of the act was to relieve trustees from their liability, and to make them thenceforth rather passive than active; and there is no more reason in this case than in any other why the trustees should not have remained passive.

Under these circumstances I cannot do better than follow the precedent established by the Vice-Chancellor *Wood*, and direct that the Petitioners have such costs only as they would have been entitled to as respondents.

[Mr. *Bowring* then applied that the four next of kin whom he represented, and who were the major part in number of the next of kin who appeared on the petition, might have the carriage of the order and the proceedings in chambers. The Vice-Chancellor directed accordingly.]

1860.

February 17,
Mar. 22, 23.

*Tenant for Life
and Remainder-
man.*

*Settlement by
Will.*

FULLERTON v. MARTIN.

GEORGE ALEXANDER FULLERTON *By the Court.*

made his will in 1847, and thereby he directed that in case of either of his daughters *Susannah* and *Mary Anne* (afterwards Mrs. *Howman*) marrying, then the sum of 6,000*l.* should be settled upon each or either of them so marrying; and he requested his trustees out of his estate and effects to set apart in their names the sum of 6,000*l.* for each or either of his said daughters so marrying, the same to be invested in the names of his said trustees upon government or real securities in *England*, with power to alter or reinvest the same into similar securities, upon trust to pay the interest or dividends thereof unto such daughter for her sole and separate use, as the same from time to time should become due during her life, independently of any husband, and without power for her to anticipate the same, and her receipt alone to be a sufficient discharge; and after her decease, upon trust to pay and divide the said securities or funds equally amongst the children of such daughter on their severally attaining the age of twenty-one years, if their mother should be then dead, otherwise not until after her decease; and if any should die under that age their shares to go to the survivors or survivor, and if but one child, the whole to him or her;

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue; and he gave his residue to *A.* for life, remainder to *B.*

Held, 1. That the testator had made a positive settlement, and

the Court could not add to it in any way.

2. That the income undisposed of after the wife's death fell into the residue.

3. That it was undisposed of income merely, and passed as such to the tenant for life of the residue.

1860.

FULLERTON

v.

MARTIN.

and if no child should acquire a vested interest in the said securities or funds, the same were to form part of his (the testator's) residuary estate and effects, and to be paid and applied accordingly. And he further ordered and directed, that from and after such marriage and appropriation of the said sum of 6,000*l.*, the annuity of 250*l.* thereinbefore given to each of the said daughters, or such of them as should so marry, should cease and determine. And as to all the rest, residue and remainder of his estate and effects, whatsoever and wheresoever, he gave and bequeathed the same, and every part thereof, unto his said trustees, upon trust to invest the same in their names in such stocks, funds or securities as aforesaid, with the like power of altering and varying the same as aforesaid, and to pay the interest or annual produce thereof to his son, the said *George Main Fullerton* (since deceased), during his life, with remainder for his children or child, as therein mentioned; and in default of any child or children of the said *George Main Fullerton* acquiring such vested interest as therein mentioned, then upon trust to pay the interest or annual produce of the said principal, stocks, funds and securities unto his son the Plaintiff *David Fullerton* for his life; and upon his death to pay and divide the said principal, stocks, funds and securities equally among his children, to be a vested interest on their severally attaining the age of twenty-one years, and in case any of them should die under that age, their shares to go to the survivors or survivor; and in default of any child or children of the said *David Fullerton* acquiring such vested interest, then upon like trusts as therein mentioned for the benefit of his (the testator's) son *Alexander George Fullerton* and his children or child; and in default of such last-mentioned children or child, then the testator gave the

said principal, stocks, funds, and securities, and the interest and annual produce thereof, to such person or persons as should be his next of kin, according to the statutes for the distribution of intestate's estates. And the said will contained provisions for the maintenance and advancement, until their respective ages of twenty-one years, of the children of the testator's said sons *George Main Fullerton* and *David Fullerton* respectively in case of the death of such sons, or either of them, leaving any child or children; but the said will did not contain any expressed provision respecting the maintenance or advancement during minority of the children or child of the testator's daughter, *Mary Ann Fullerton*, in case of her decease, and the testator thereby appointed the said *John M'Neile*, *John Martin*, and *Peter Breton* executors of his said will.

1860.

 FULLERTON
 v.
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The testator died in 1847. His daughter, *Mary Ann*, married the Petitioner *G. E. Howman* in 1854; there was one child of the marriage, *Arthur F. Howman*, born in 1857, and Mrs. *Howman* died in 1859, and her husband, *G. E. Howman*, was her personal representative. A settlement of the usual kind was made by Mr. *Howman* on his marriage of funds of his own, amounting to 2,500*l*. *George Main Fullerton* died unmarried in 1848. *David Fullerton* was the Plaintiff, and had nine children living, all infants. *A. G. Fullerton* had only one child, who died under age.

The petition was presented by Mr. *Howman's* infant son, representing that there was no provision for him except his father's settlement, and the 6,000*l*. comprised in the testator's will; that his father had six children by a previous marriage, and had no income

1860.

FULLERTON
v.
MARTIN.

but that derived under his settlement, and the fruits of his rectory; and praying that the income of the 6,000*l.* might be paid to his father, as personal representative of his deceased mother; or otherwise that a settlement of the usual kind might be made of the said sum of 6,000*l.*, and that maintenance might be allowed to the infant petitioner, and for accumulation of the surplus for his separate benefit.

The principal questions were, whether the income of the fund belonged to Mrs. *Howman*, and after her death to her husband as her representative; and if not, then whether a settlement ought not to be made, giving a life interest to the father, Mr. *Howman*, with maintenance and advancement clauses for his child; or whether the settlement made by the will was the only settlement that could take effect.

A subordinate question was whether, if the settlement made by the will was the true and only settlement, then whether the income falling into the residue as undisposed of, was to be treated as income for the benefit of the tenant for life of the residue, or capitalised, the income to go to the tenant for life, and the *corpus* to the tenants in remainder.

The case was originally argued on the 7th of October, 1859, on the assumption that Mr. *Howman* had no claim to any interest; and *Shaw v. Cunliffe (a)*, and *Harris v. Lloyd (b)* were cited to show that the income fell into the residue.

Upon the question whether it fell into the residue as

(a) 4 Br. C. C. 144.

(b) Turn. & Russ. 310.

income or as capital, *Crawley v. Crawley (a)*, *Morgan v. Morgan (b)*, and *Cranley v. Dixon (c)* were cited.

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FULTON
v.
MARTIN.

On the 2nd and 3rd March, 1860, the case was re-argued.

Mr. Glasse for Mr. Howman.

The first question is, was a settlement made by the testator? Is that which he has done a settlement, or does it still remain for the Court to make a settlement? Now the testator commences by directing that the 6,000*l.* "shall be settled," and then he proceeds to make an imperfect settlement, and therefore he has not carried out his intention; so that a settlement supplying the deficiencies still remains to be made. One of these deficiencies would be, a life estate to the husband on the death of his wife; another, maintenance for the children. But assuming the settlement of the testator to be final, then what becomes of the income during the minorities of children, which he has not settled? I say it went to Mrs. *Howman*, and Mr. *Howman* takes it as her representative. The gift of the 6,000*l.* is in the first instance absolute; 6,000*l.* is to be set apart for each of the daughters marrying. True, that is afterwards cut down; and so far as it is cut down, of course it is not absolute. But so far as the absolute gift is not restricted or cut down, it remains part of the original absolute gift. The income after the death of Mrs. *Howman* was therefore part of her estate, and passes to her husband.

Mr. Kenyon for Mr. Howman's infant child.

The income belongs to the child, and should be

(a) 7 Sim. 427. (b) 4 De G. & Sm. 164. (c) 23 Beav. 512.

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FULLERTON
v.
MARTIN.

accumulated for his benefit or else applied to his maintenance. The gift of the 6,000*l.* is in the first instance absolute; that carries the interest. The settlement made, only modifies that gift to the extent actually expressed, viz. by the interposition of the mother's separate life estate. On the mother's death, the child's interest vested, and the income belongs to him as well as the capital.

Mr. *E. G. White* for the children of *D. Fullerton*, tenants in remainder of the residue.

The testator has himself pointed out the trusts; therefore there remains no settlement to be made. It is clear you cannot introduce any clause for a life interest to the husband; why then should a clause for maintenance be introduced? it would be cutting down the express gift over. The income is by the testator's own settlement undisposed of, and it falls at once into the residue. Then what is the gift of the residue? Why, to *D. Fullerton* for life, remainder to his children. The income becomes residue and must therefore be capitalised, and the income only of it belongs to *D. Fullerton*.

Mr. *Baily* and Mr. *Freeling* for *David Fullerton*, the tenant for life of the residue.

(They argued in the same way as the counsel for *D. Fullerton's* children, that the undisposed-of income fell into the residue.)

Then assuming it to be residue, it falls in not as capital, but as income from time to time; its becoming residue does not alter its character of mere income; it is

income undisposed of and passes as income to the tenant for life of the residue. They cited *Lassence v. Tierney*(a). [*Gompertz v. Gompertz* (b) was also cited in the argument.]

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FULLERTON
v.
MARTIN.

The VICE-CHANCELLOR.

The testator by his will has given an annuity of 250*L*. to each of his four daughters during their respective lives; and with regard to two of them, he makes certain provisions in contemplation of their marrying. [The VICE-CHANCELLOR here read the clauses set out in pp. 31 and 32.]

One of the views which has been presented to the Court is, that the clause is in effect a direction to the trustees to make a settlement; that is, to create a deed of settlement containing certain provisions, and that the effect of the will is that in such settlement the trustees are to introduce all such directions as they may think right and proper; and that, although the testator does direct certain provisions, still, provided such directions are attended to, all other provisions which are usual and proper in a marriage settlement must be introduced.

Another contention which has been raised is, that the effect of the will is in the first place to sever the fund entirely from the estate, and to give it absolutely to the daughter, and then merely to engraft upon that absolute gift certain directions, affecting only the mode of enjoyment; and then it is contended that upon the authorities the result is, that so far as this direction or modification of the enjoyment does not exhaust the

(a) M'N. & G. 551.

(b) 2 Phil. 107.

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 MARTIN.

whole beneficial interest in the fund, the general gift would prevail in favor of the daughter.

On the other hand it is contended, that although it is true the testator directs the 6,000*l.* to be settled, yet he has himself prescribed the terms and provisions of such settlement, and *that* is the settlement which the trustees are to make, or which the testator has made; and that if in construing a settlement made in those terms it does not exhaust the whole beneficial interest in the fund, what remains must fall into the residuary estate.

The facts are not in controversy; and there being an interval between the time when Mrs. *Howman* died, and the time when the child will attain the age of twenty-one, the question is, what becomes of the interest of the 6,000*l.* during that interval.

I am of opinion that the true construction of this will is as follows :—

In the first place, I very much doubt whether the testator intended any deed of settlement or instrument to be prepared and executed in order to work out his objects. No doubt if the first direction had stood alone, and there had been a direction that 6,000*l.* should be settled and nothing more, that would clearly have amounted to an absolute gift to Mrs. *Howman* with a direction to the trustees to settle it, and upon her marriage a settlement ought to have been executed. But in addition to that we have special directions given by the testator as to the trusts and provisions upon which the fund is to be held; a trust to vary securities, and a trust to pay the income for the benefit of the daughter during her life, with certain trusts for her children, and

an ultimate direction that if no child attains a vested interest, the fund shall form part of the residue; and finding this, I much doubt whether the testator intended that a deed of settlement should be executed. That however is not material; for if I thought he intended such a deed to be executed, the question would still remain whether it would be competent to the trustees to introduce into such deed of settlement anything not contained in these directions. It must, no doubt, be considered that the testator, in making a provision for his daughter in the event of her marrying, intended to provide for the daughter and any children she might have; and it is true that in cases arising out of marriage articles which are to be worked out by a proper deed of settlement, the Court has sometimes in framing the deed taken upon itself to modify the language of the articles, for the purpose of working out what it is clear must have been the intention. And thus in some cases in which a testator has directed that real estate shall be settled upon A. for life, and after his death upon the heirs of his body, or upon A. for life, and then to trustees to preserve, with remainder to the heirs of his body; then, inasmuch as the effect of adhering to the language of the will would have been that the person who was intended to take a life estate only would take an estate tail, and so be enabled to destroy the interest of his issue, for whose benefit the settlement was chiefly intended, the Court has determined that the tenant for life shall not have the power of defeating such intention, and has modified the language, so as to give him an estate for life only, and has limited the estate to the first and other sons as tenants in tail. But in such cases, unless there be something in the articles or will which can be laid hold of as showing the intention, the Court has declined to modify the language. And

1860.

 FULLERTON
 v.
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FULLERTON
v.
MARTIN.

where, as in the present case, a testator has himself prescribed the terms of the settlement, (even supposing he intended a deed to be executed,) is there any case in which the Court has taken upon itself to alter the terms, or to introduce terms not contained in the will? I know of no such case, and I am satisfied it would be contrary to the practice of the Court, and contrary to the intention of the testator. Had the testator merely directed a proper settlement to be made, the Court would have had to determine what would be a proper settlement; but here the testator has himself directed what are to be the terms of the settlement, and the Court will not take upon itself to introduce other clauses.

But there are other reasons why I cannot do what is asked. If I were to introduce a clause providing for the application of the interest between the death of the mother and the time when the child will attain twenty-one to the maintenance of the child, the effect would be to give the child an immediate vested interest. This would be contrary to the testator's intention. The testator intended that no child of his daughter should have a vested interest until twenty-one, and has provided that if no child *took a vested interest*, the fund should fall into the residue.

Moreover, if I were at liberty to introduce any new clauses, what clauses ought I to insert? Should I insert clauses for advancement, accumulation, and the like? and where should I stop? If I were once to begin to introduce new provisions not directed by the testator, I should in truth be making a will for him.

Upon the whole, therefore, it appears to me that even

if I am to regard this will as directing a settlement to be made by the trustees, the testator's directions are to be strictly adhered to, and that it is not competent for the Court to introduce any other provisions.

1860.

 FULLERTON
 v.
 MARTIN.

Another view which has been suggested is, that the first gift is an absolute gift to the daughter; and then that engrafted on this are modifications as to the mode of enjoyment, but I do not think this a true view of the case. If the first clause had stood alone, it would have been an absolute gift; but the testator clearly did not intend this 6,000*l.* to be absolutely severed from the estate; but on the contrary, after making such limitations of the fund as he thought fit, he has prescribed that in certain events it should form part of his residuary estate. I think, therefore, that it is impossible to say that this amounts to an absolute gift to the daughter, with only some provisions engrafted thereon as to the mode of enjoyment.

I am therefore of opinion that the intermediate income between the death of the mother and the attainment of a vested interest by the child remains undisposed of, and that it falls into the residue. Then comes the question in which *David's* children are concerned. *David* says he is tenant for life, and that the income undisposed of falls to him; while, on the other hand, his children contend that it forms part of the corpus of the residue. It appears to me upon the authorities that it forms part of the income. It is income of the fund which is part of the residue unless the child of Mrs. *Howman* attains a vested interest; and therefore belongs to the tenant for life of the residue. The authorities appear to me to be clear upon that point; and the case of *Shaw v. Cunliffe* does not touch the question.

1860.
Mar. 8, 19.

Settlement.
Rectifying
Deed.


SELLS v. SELLS.

Where a marriage settlement is prepared, pursuant to the intention of one of the parties, but under a mistake as to the other, it cannot be rectified.

THIS was a bill to rectify the settlement made on the marriage of Mr. and Mrs. *Sells*. The bill was filed by the husband more than fourteen years after the marriage.

Previously to the marriage a settlement of Mrs. *Sells'* property had been prepared, giving her the first life interest to her separate use without power of anticipation, remainder to the husband for life, remainder to the children, remainder to the survivor of husband and wife. The age of Mr. *Sells* was about twenty-four; Mrs. *Sells* was twenty years older. Mr. *Sells* had no private property. Captain *Ward*, a friend of Mrs. *Sells*, and her intended trustee, in perusing the settlement, after its execution by Mr. and Mrs. *Sells*, observed that Mr. *Sells* brought nothing into settlement, and he pointed this out to the solicitor who acted for him, but who had not drawn the settlement, and requested him to see Mr. *Sells* upon it, and to suggest that as he had no present property, he should settle his after-acquired property; Mr. *Sells* having in fact some future expectations of a particular property. The solicitor accordingly saw Mr. *Sells*, and pointed out to him that "the future property" (meaning Mr. *Sells'* future property) should be brought into settlement. Mr. *Sells* was at that time—although he had executed the settlement—under the impression that his wife's future property was not settled; and, supposing that

the solicitor referred to that, expressed his acquiescence and intention that it should be settled. Mrs. *Sells* and the trustee both understood and intended that Mr. *Sells'* future property was to be settled. A few words were then hastily introduced to that effect in the clause settling the wife's future property, and Mr. and Mrs. *Sells* re-executed the settlement. Mr. *Sells* proved that the effect of it had not been explained to him so as to make him understand it, and that in fact he never understood or intended that his property should be settled. The settlement of his property was the same as that of the wife's; viz., to the wife for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children, remainder to the survivor of the husband and wife. So that when Mr. *Sells* came into possession of his after-acquired property, he was stripped of all immediate enjoyment of it.

1860.

SELLS
v.
SELLS.

The point mainly argued on the part of the wife, and on which the judgment exclusively turned, was, that to rectify a settlement the mistake or misinstruction must be *mutual*.

Here there was no mistake on the part of the wife; she clearly understood and intended that her husband's future property was to be settled, though she did not understand that she was to have a first life estate in it.

The husband, on the other hand, it was proved, was under a mistake: he thought it was his wife's future property and not his own that was required to be settled, and was settled.

Mr. *Baily* and Mr. *H. F. Shebbeare* were for the Plaintiff, the husband.

1880.

SELLS
v.
SELLS.

It is clearly shown that the husband did not intend to settle his own property; there is no authority on this point. All the cases go upon mutual mistake; but does that make any difference? The contract, to be a contract, must be mutual. The settlement is the settlement of both, or it is nothing. If the wife intended the husband's property to be settled, but the husband did not, how can effect be given as a contract to that which is not the contract of both parties?

Mr. *Glasse* and Mr. *Archibald Smith*, for the wife, referred to *Rooke v. Lord Kensington* (a).

Mr. *Toller* and Mr. *Cottrell*, for the trustee, took no part in the argument.

The VICE-CHANCELLOR recapitulated the facts above stated, and proceeded:—

The position of the parties was therefore this: Mr. *Sells* did not understand the effect of the additional clause, and did not intend it. But what was the position of Mrs. *Sells*? Captain *Ward* was acting for her as her friend and adviser: he and Mrs. *Sells* both understood it to be the intention of her husband to settle his after-acquired property, though Mrs. *Sells* did not understand that she was to take a first life estate to her separate use.

We have therefore here a new case, of a mistake not mutual. Now I quite agree in the principle stated in the case before the Vice-Chancellor *Wood*. You cannot, I think, correct an instrument made in consideration of

(a) 2 K. & J. 753.

marriage, except on evidence of the mistake of both parties. The wife is bargaining for herself and her children ; and the question always is, What is the contract on which the marriage took place. Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property.

1860.

 SELLS
 v.
 SELLS.

In the absence of authority, I think I should be establishing a very dangerous precedent, if I were to hold the mistake of one of the parties, sufficient for rectifying a settlement.

His Honor then adverted to the fact of Mrs. *Sells* not understanding that she was to have the first life interest to her separate use, with a view to considering whether he could *pro tanto* rectify the settlement, and was of opinion that he could not.

The bill was therefore dismissed.

1860.
March 23.

Infants.
Guardian ad
Litem.
Trustees'
Costs.

In re DUKE OF CLEVELAND'S HARTE
ESTATES.

Where an infant is entitled to appear as respondent on a petition, whether in a matter or a cause, he must appear by a duly constituted guardian *ad litem*.

Costs of trustees who had been served and appeared on a petition by a tenant for life for investments of railway purchase-moneys allowed against the company.

THE question which arose on these petitions was, whether it is necessary that a guardian *ad litem* should be specially appointed to an infant appearing upon a petition for the investment of trust funds in which he is interested. Another question was, whether the trustees, who had been made respondents upon a petition presented for the investment of the proceeds of their trust estate purchased by a railway company, were entitled to their costs as against the railway company.

The two petitions were presented by *Frederick Acclom Milbank*, for the investment of the purchase-money of certain lands of which under the will of the Duke of *Cleveland* he was tenant for life, and which had been paid into Court.

William Henry Vane Milbank, the tenant in tail of the trust estates in question under the Duke of *Cleveland's* will, was made a Respondent on these petitions.

One of the petitions sought the investment of the purchase-money of land which had been taken by the *Hartlepool Harbour and Railway Company* under the provisions of their act, and the trustees of the Duke of *Cleveland's* will were served with and appeared upon this petition.

Orders had been made upon both petitions as prayed,

but the Registrar refused to draw up the orders until a guardian *ad litem* had been appointed to the infant Respondent, and the point now came on to be decided by the Court.

1860.

In re
 DUKE OF
 CLEVELAND'S
 HARTLE ESTATE.

Mr. *W. H. G. Bagshawe* appeared for the Petitioner.

Mr. *G. O. Morgan*, for the infant remainderman, referred to *Re Greaves (a)*, in which case a guardian *ad litem* had been appointed though there was no suit pending.

Mr. *Renshaw*, for the trustees under the Duke of *Cleveland's* will, applied for their costs as against the company.

Mr. *Hawkins*, for the *Hartlepool Harbour and Railway Company*, submitted that the Lords Justices had laid it down that the tenant for life, being the *dominus litis*, the trustees were not necessary parties; and therefore that their costs should not be allowed as against the company; *Re Browne, Ex parte Staples (b)*; *Wilson v. Foster (c)*.

[Mr. *Martindale*, as *amicus curiæ*, said that the Vice-Chancellor *Stuart* had in a similar case consulted the Master of the Rolls and the Vice-Chancellor *Wood*, and come to the conclusion that the appointment of a guardian *ad litem* was necessary; *Re Warde (d)*.]

The VICE-CHANCELLOR said it was desirable that an uniform practice should be established, and he thought

(a) 23 Law T. 53.

(c) 26 Beav. 398.

(b) 1 De G., M. & G. 294.

(d) 1 Law T., N. S. 82.

1860.

In re
DUKE OF
CLEVELAND'S
HARTE ESTATE.

that it was necessary that a guardian *ad litem* should be appointed.

With regard to the question of the trustees' costs, Mr. *Milne*, the Registrar, had referred him to a note of a case of *Ex parte The Norfolk Railway Company (a)*, which had recently come before the Master of the Rolls, and in which the Master of the Rolls had allowed the trustees their costs according to the act, and he thought in the present case he should take the same course and allow the trustees their costs.

(a) The note in the Registrar's Book was as follows:—

"Ex parte the Norfolk Railway Company.

"Hetherington, for Petitioner and Mr. Robert William Cann.

"Chapman, for the Company, contends that under the act the only necessary party is the tenant for life, and objects to the costs of the trustees.

"Cur. (Master of the Rolls), give costs according to the act, including those of the trustees: overruling Chapman's objection."

1860.
April 16.

*Injunction.
Action at Law
against Sheriff.
Writ of Assist-
ance.*

WALKER v. MICKLETHWAIT.

THOMAS MICKLETHWAIT died in 1837, leaving considerable real and personal property, part in trust for sale and payment of debts, and the residue, consisting of *Claxton* estate, to his son *Thomas Faber Micklethwait*.

In 1852 a creditors' suit was instituted for the administration of the estate of *Thomas Micklethwait*, and in 1854 an order was made for sale of the real estate devised in trust for sale, and it being alleged that there was still a deficiency for payment of debts and costs, in 1856 another order was made for the sale of a sufficient part of the other real estate free from the incumbrances of those incumbrancers who consented, and subject to the incumbrances of those who did not, independently of *Mr. Thomas Faber Micklethwait's* interest in the same under his father's will.

On the 11th of September, 1858, the Plaintiffs sold the whole of the estate in the possession of *J. F. Micklethwait* to *Mr. James Walker*, of *Sand Halton*; and on the 28th of January and the 12th of May, 1859, orders were made for possession of different portions of such estate, and writs of assistance were issued, directing the sheriff of *York* to put the purchaser in possession of the premises; and on the 25th, 26th and 28th of February, and the 21st of June, 1859, the sheriff's

The Court of Chancery exercises a discretion in permitting actions at law to proceed, but it will never permit its decisions to be questioned in a Court of Law.

Therefore, where an action of trover was brought against a sheriff for an ejectment under a writ of assistance, issued in pursuance of an order of the Court, an injunction was granted, restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order.

1860.


WALKER
v.

MICKLETHWAIT

officers ejected the Defendant, *Thomas F. Micklethwait* from the premises.

On the 24th of December, 1858, Mr. *Walker*, the purchaser, paid his purchase-money into Court, and thereupon by the conditions of sale became entitled to the possession, or to the rents and profits as from the 29th of September, 1858.

On the 2nd of February, 1860, *Thomas F. Micklethwait* commenced an action against the purchaser, Mr. *Walker*, the sheriff's officer, and his agents.

The declaration in that action was to the effect that the Defendants entered certain land of the Plaintiffs, and damaged and broke down certain buildings and sheds of the Plaintiffs, and converted the materials of the same to their own use, and ejected the Plaintiffs from the premises; and also that the Defendants seized certain goods, chattels, fixtures, and effects, and large quantities of timber and other chattels and furniture of the Plaintiffs, and carried away and converted the same to their own use.

It appeared that in April, 1845, *Micklethwait* leased *Claxton* estate to *John Lisiter* for fourteen years, and that this lease had been assigned to *John Jackson*. This lease having expired in February, 1859, *Micklethwait* on the 9th of August, 1859, commenced an action against *Jackson* for the half-year's rent due to the 2nd of February, 1859, and also for damages for breaches of covenant.

Mr. *Baily* and Mr. *Little* in support of the motion.

These two actions are brought in defiance of the orders of this Court, and this Court will not permit them to go on. The actions are founded on the assumption that *Micklethwait* is still the owner of the premises, and, as such, entitled to the possession, and also to the rent and damages for breach of covenant by the lessee; *Frowd v. Lawrence* (a); *Aston v. Heron* (b). The actions complain of ejectment; and if the orders made by this Court are right, the Defendant has no right to make this complaint; and thus the orders of this Court are brought into question; *Morrison v. Morrison* (c); *Russell v. East Anglian Railway Company* (d).

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Mr. *Roxburgh*, for the Plaintiff at law, submitted that the action at law against *Walker*, though partly an action of trover, sought damages for a trespass in taking possession of *Micklethwait's* chattels which were on the premises, and not included in the order of the Court, and that the action against *Jackson* was an action for rent and damages for breach of covenant, to part of which, at all events, the Defendant *Micklethwait* was entitled, and that therefore the Court would not stop the actions at law.

The VICE-CHANCELLOR.

The present application asks the Court to restrain the actions which have been commenced by *Micklethwait*, and also to commit *Micklethwait* for contempt of Court.

Both these actions proceed on the footing that the proceedings in this Court are entirely wrong, and that

(a) 1 Jac. & Wal. 655.

(b) 2 My. & K. 390.

(c) 10 Jur. 773.

(d) 3 M. & G. 104.

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Micklethwait is still the owner of the property, and, as such, entitled to recover damages for the trespass, and for having been ejected therefrom, and also entitled to the benefit of the covenants in *Jackson's* lease, including that for the payment of rent. The ground taken by the learned counsel for *Micklethwait* in argument with respect to the action against *Walker*, is that (admitting the decree for sale and the writ of assistance, and other proceedings to be valid and regular) the purchaser has improperly taken possession of certain chattels which do not form part of the property he has purchased; and that the action is an action of trover to recover the value of those chattels; and that he ought not to be restrained from prosecuting such an action. But that is not a full and correct representation of the nature of the action. It is in part indeed an action of trover, but it also seeks for damages on account of the injury alleged to be done to the premises, and on account of having been ejected therefrom. I think the principle on which this Court acts in cases of this kind is that stated in *Aston v. Heron* (a). The principle is this, that if a person has sustained injury in consequence of any order or proceeding of this Court, or by reason of anything which has occurred in the execution of its process, he must seek redress here, and not in a Court of Law. If the matter complained of involves a question of the jurisdiction of this Court, or of the validity or effect of its order or process, this Court will never allow such a question to be carried for decision to a Court of Law; but if, admitting the jurisdiction of the Court and the validity of its order, redress is sought merely in respect of some irregularity or excess in the execution of its order, this Court will at its discretion either itself give

(a) 2 My. & K. 390.

redress to the aggrieved party, or permit him to proceed at law, as justice and convenience may require.

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In the present case, it is true, the action against *Walker* is in part an action of trover; but even regarding it in that light, the chattels to which it relates are, for the most part, at least the materials which formed part of the structure of the buildings on the premises; so that if the action were to proceed, the Court of Law would have to consider whether *Micklethwait* was the owner of the property, and whether the persons taking possession of the chattels were infringing his rights as owner. Now by virtue of the proceedings of this Court, the premises had from the 29th of September, 1858, ceased to be in equity the property of *Micklethwait*, and had become the property of the purchaser. Therefore the validity, or propriety, or effect of the proceedings of this Court would come into question in the action. But this Court considers itself the best judge of such questions; and therefore, even if this action had been confined to trover, it would not be right that it should proceed.

But this action is not merely an action of trover; it further seeks damages for a trespass by the officers in executing the process of this Court; and on that ground also it cannot be allowed to proceed.

With regard to the action against *Jackson*, the tenant. The rent sought to be recovered, though payable on the 1st of May, was due in the preceding February, and included the half-year's rent from the preceding August. But *Micklethwait* was only entitled to the proportion of that rent up to the 29th of September. It seeks also to recover damages for breaches of covenants contained

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in the lease. For anything that appears in the declaration those breaches may all have occurred since the 29th of September. To both these actions the only defence would be by an equitable plea, and that this Court will not subject the Defendant to.

Where application is made to this Court to restrain an action, and the Defendant at law has pleaded an equitable plea, he has made his choice and elected his Court; but if he has not so pleaded, there is nothing to prevent him from coming to this Court.

It appears to me therefore that I am bound to restrain both the actions.

The real question is, whether I ought to direct a reference to ascertain what damages have been sustained by *Micklethwait*. I do not think that I ought now to do so. But in restraining the actions, I do not mean to preclude *Micklethwait* from making any application to this Court that he may be advised.

The motion also seeks to commit *Micklethwait* for contempt of Court. Though I do not think it necessary to take that course, *Micklethwait* must pay the costs of the motion and also of the two actions.

In re NATIONAL PATENT STEAM FUEL
COMPANY.

BAKER'S CASE.

THIS case came on upon a summons adjourned from Chambers, which had been obtained by the official manager to review the decision of the chief clerk, who had allowed the claim of Mr. *Baker*, formerly one of the directors of the above company, as a creditor of the company for money borrowed for and advanced by him to the company.

The 31st section of the deed of settlement of the

dealing in which a director is interested to be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, is not confined to contracts or dealings *ejusdem generis* with the contracts referred to in the preceding clause of the same section, which merely incapacitates a director from voting respecting specified contracts in which he is interested, but includes an advance of money by a director to the company.

The words "summoned for that purpose" apply to a special meeting, and not to a general meeting of shareholders; but to give force to a contract as against the company it is necessary not only that the question should be discussed, and even unanimously approved of by such a meeting, but that the terms of such contract should be submitted to and be by resolution approved and confirmed to give it validity.

Therefore, where directors lent money to a company, and in a report presented by the directors to the next general meeting of shareholders was contained an item, "loans, 6,000*l.*," which item was discussed, and the report was approved and confirmed by the meeting, and a winding-up order was subsequently made against the company:

The Court, upon a claim by one of the directors for the money so advanced by him to the company, disallowed the claim, holding that it was such a contract by a director with the company as was contemplated by the 7 & 8 Vict. c. 110, s. 29, and that the terms of such contract had not been approved and confirmed by a meeting of the shareholders as required by that section. But considering that it is competent for a director to advance money to carry on the business of the company, the Court held that the director was entitled to establish a claim for so much of the money as had been properly applied for the purposes of the company.


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February 11th
& 13th.

7 & 8 Vict. c.
110, s. 29.

Loan by Di-
rector to Com-
pany.

Confirmation by
Shareholders.

The clause con-
tained in the
29th section of
the Joint Stock
Companies Re-
gistration Act
(7 & 8 Vict.
c. 110), re-
quiring every
contract or

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National Patent Steam Fuel Company authorized extraordinary general meetings of the shareholders (among other things) to empower and require the directors to borrow, and to take upon mortgage or on such other securities as to the meeting might seem fit any sum or sums of money not exceeding 25,000*l*.

At an extraordinary general meeting held on the 14th of July, 1853, the directors were empowered and required to borrow and to take up on debentures any sum or sums of money not exceeding 25,000*l*. in the whole.

In October, 1855, Mr. *Baker*, at the request of the directors of the company, and on behalf of the company, together with certain other directors, borrowed 5,000*l*. from the *English and Scottish Law Life Assurance Company*, and to secure that sum and interest and the premiums on policies of insurance effected on their lives as a collateral security, they executed a deed of assignment of the policies and covenant to trustees on behalf of the insurance company, and a sum of 4,731*l*. 8*s*., being the amount of the loan after making certain small deductions, was on the 24th of October, 1855, paid to the bankers of the company to their credit.

One of the policies which had been effected for 2,500*l*. on the life of one of the directors having fallen in, that amount was written off against the amount due to the insurance company in respect of the loan of 5,000*l*.

Mr. *Baker* on the 8th of March, 1856, with certain other directors, borrowed from the same insurance company a further sum of 1,500*l*., and they executed a deed

of assignment of the policies and covenant to the insurance company to secure the same.

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The next ordinary general meeting of the shareholders was held on the 22nd of March, 1856. It appeared that these loans were not specifically brought to the attention of the meeting, but that in a statement of account contained in a report submitted to the meeting by the directors, there was among other items an item "loans 6,000*l*." This 6,000*l*. included the balance due in respect of the two loans from the *English and Scottish Law Life Assurance Company*; but there was nothing to show that on the face of the report. The report so presented by the directors was adopted and confirmed by the meeting.

It appeared from the evidence that at the meeting of the 22nd of March, 1856, the attention of the shareholders was called to the state of the several loan accounts, and particularly of the two loans from the *English and Scottish Assurance Company*, and the conduct of the directors in reference to such loans was unanimously approved by the shareholders, but that no resolution was submitted to the meeting respecting those loans, because the directors believed that they had been authorized to effect such loans by the resolution authorizing them to borrow sums not exceeding 25,000*l*., and that after the sanction which had been given to the form of a loan obtained from the *Great Britain Insurance Company* in 1854, under precisely similar circumstances, and which loan had been confirmed at a meeting held shortly afterwards, there was no necessity again to ask for a formal confirmation on the part of the shareholders beyond obtaining an expression of their approval.

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Mr. *Baker* on the 3rd of August, 1858, paid 2,659*l.* 1*s.* 4*d.* to the *English and Scottish Life Assurance Company* on account of the *National Patent Steam Fuel Company* in respect of the above loans; and he carried in a claim for that sum and interest before the chief clerk under the winding-up order, which had been made against the *National Patent Steam Fuel Company*.

Mr. *Glasse* and Mr. *Baggallay*, for the official manager, opposed the claim, and submitted that the claim in respect of the loan was invalid as against the company; that it was a contract or dealing by a director with the company within the meaning of the 29th section of the Joint Stock Companies Registration Act, 1844 (*a*),

(*a*) The 29th section of the 7 & 8 Vict. c. 110, is as follows:—That if any director of a joint stock company, registered under this Act, be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director, and that if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article, or of service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like con-

tract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders, to be summoned for that purpose, and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting, and that if at any time any director cease to be a holder of the prescribed number of shares in the company, or shall become a bankrupt or insolvent, or shall have suspended payment, or compromised with his creditors, or be declared a lunatic, then it shall be unlawful for any such director to continue as a director, or to act as such, and the office of such director shall be and is hereby declared to be vacant.

and the terms of the loan not having been submitted to and approved and confirmed by the shareholders in the manner provided by the 29th section of that act, the contract had no force, and the claim for the loan ought not to be allowed as against the official manager under the Winding-up Order; *Ex parte Green* (a); *Steere's case* (b).

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Mr. *Baily* and Mr. *W. Mackeson* in support of the claim.

1st. The borrowing of money by a director on behalf of and for the purposes of the company is not such a contract as was contemplated by the 29th sect. of the 7 & 8 Vict. c. 110. The contracts referred to in the second branch of the section include only contracts *ejusdem generis* with those specified in the first branch, namely, contracts for land, materials or work to be done; and a loan of money cannot be said to be *ejusdem generis* with such contracts.

2nd. The loans in question, though perhaps not formally submitted to the shareholders, were in fact submitted to and approved by the shareholders present at the general meeting of the 22nd of March, 1856, and thus the provisions of the 29th sect. have been substantially complied with. It is not necessary that a general meeting should be "summoned for the purpose." Those words apply to special meetings only.

3rd. The money the proceeds of the loan having been applied by the directors for the purposes of the company, Mr. *Baker* is entitled to recover it from the official manager.

(a) 24 L. J. 331.

(b) 29 L. J. 43.

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They referred to *Plate Glass Universal Insurance Company v. Sunley* (a); *Chippendale's Case* (b); *Ernest v. Nichols* (c); *Murray's Executor's Case* (d); *Teversham v. Cameron's Company* (e); *Maclae v. Sutherland* (f); *Norwich Yarn Company, Ex parte Bignold* (g); *Foster v. Oxford, Worcester and Wolverhampton Railway Company* (h); *Poole v. National and Provincial Life Insurance Company* (i); *Bryson v. Warwick and Birmingham Canal Company* (k).

Mr. Glasse in reply.

The VICE-CHANCELLOR (after stating the facts above set out):

The transaction in respect of which this claim is made was the borrowing money by certain individual directors in order to lend that money to the *National Patent Steam Fuel Company*, it being intended that the company should guarantee those borrowers from the obligation to pay. It was intended that the *Company* should pay the debt, and that if the borrowers should be compelled to pay it, then the company should indemnify them. The first question is whether a transaction of that sort comes within the scope and meaning of the 29th sec. of the 7 & 8 Vict. c. 110. The policy of that section was to prevent what might be called "jobbing" by directors against the interests of the shareholders. It was to prevent directors from placing themselves in a position where their interest might conflict with their duty; and

(a) 8 Ell. & B. 47; S. C.
6 Exch. 796.

(b) 4 De G., M. & G. 33.

(c) 6 H. of L. Cas. 401.

(d) 5 De G., M. & G. 746.

(e) 3 De G. & Sm. 296.

(f) 18 Jur. 942.

(g) 22 Beav. 144.

(h) 17 Jur. 167.

(i) 4 Jur. N. S. 54.

(k) 4 De G., M. & G. 711.

with that object the two branches of the section are framed. The language of the first branch is, "That if any director of a joint-stock company registered under this Act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director." Upon this a question has been raised whether the words "for any purpose whatsoever" mean "for any purpose *ejusdem generis* with any of those which are specifically mentioned," viz. for land, materials or work. It does not seem to me to be very important in the present case to decide that question; because, even if that were the true construction of that first branch of the section, it would not follow that the contracts mentioned in the second branch of the section are to be confined to the sort of contracts mentioned in the first. The second branch of the section is as follows:—"If any contract or dealing, except, &c." (I will presently refer to the exception) "shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and that no such contract shall have force until approved or confirmed by the majority of votes of the shareholders present at such meeting." Supposing, then, a contract to be entered into between the acting directors of a company and an individual director, by which that director agrees to lend to the company so much money upon certain terms, does such a contract

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come within the meaning of this second branch of the section?

Now it appears to me in the first place, that it certainly comes within the mischief which the Act was intended to prevent, because a director by entering into such a contract may be in a position in which his interest conflicts with his duty. It is his interest to lend the money on the most favorable terms for himself; it is his duty in his character of director to obtain the loan on the most favorable terms for the company; therefore such a transaction appears to me to come within the mischief intended to be prevented by the act. And clearly it comes within these words "a contract in which a director is interested," if the word "contract" is used in its general and ordinary sense. The question then is, whether the contracts mentioned in that second branch of the section mean only such contracts as are mentioned in the first branch; and, if they do, whether the contracts in the first branch (and therefore the contracts in the second) are limited to contracts *ejusdem generis* with the contracts specifically mentioned in that first branch, viz., contracts relating to land, materials, or work done, and therefore not including a contract for the loan of money. Now, in the first place, the second branch of the section uses language which does not in any way refer to the first branch. If it had been intended to limit the contracts mentioned in the second branch to such as are mentioned in the first branch, the language would have been "any such contract as before mentioned." Besides, in addition to the word "contract," the second branch contains the word "dealing," which is not found in the first branch. *Primâ facie*, then, I should consider that it was not intended to limit

the contracts in the second to those in the first branch, assuming that those in the first branch are of a limited description. But further, from the language of the exception in the second branch it appears to me to be clear that the contracts in the second branch cannot be limited to those which are *ejusdem generis* with the particular species of contracts mentioned in the first branch. For among the contracts or dealings comprised in that exception are policies of assurance and grants of annuities; and surely it is impossible to say that a policy of assurance, or the grant of an annuity, is a contract *ejusdem generis* with the contracts specifically mentioned in the first branch of the section, that is, contracts for land, materials, or work to be done. Furthermore, we have the opinion of Lord Wensleydale, in the House of Lords, in the case of *Ernest v. Nichols* (a), to this effect, that a contract for amalgamation between two companies is such a contract as comes within both branches of this section; and no one will say that a contract by which two joint-stock companies agree to amalgamate their business, or by which one of them agrees to assign over all its business to the other, is a contract *ejusdem generis* with a contract for land, materials or work to be done. Besides which we have the express decision in *Teversham v. Cameron's Company* (b), that a contract by a director for the loan of money to the company is a contract that comes within the operation of this 29th section of this act.

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The next question is, whether there has been a compliance with the requisitions of the act with regard to such a contract, which are, that the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned

(a) 6 H. of L. Cas. 412.

(b) 3 De G. & Sm. 296.

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for that purpose; it being expressly enacted that no such contract shall have force till approved and confirmed by the majority of votes of the shareholders present at such meeting. Upon this clause a question has been raised, whether the words "to be summoned for that purpose" apply not only to the special meeting, but also to the general meeting? So far as it is necessary to express any opinion upon that point, I think with Lord Justice *Turner*, in *Murray's Executor's Case* (a), that it is not necessary that the general meeting—provided it is the next general meeting—should be summoned for the purpose, and that those words were intended to apply to the special meeting only; although it must be admitted that having regard to the position of the words, the mere grammatical construction would lead to a different conclusion. It was suggested that Lord *Wensleydale* used language which expressed a different opinion; but, on reading his judgment, I have come to the conclusion that he did not mean to express any opinion about it; and therefore I do not think there is any real conflict of opinion between Lord *Wensleydale* and Lord Justice *Turner* on that point. If, then, this contract had been submitted to the next general meeting, and approved and confirmed by the majority of votes at that meeting, though not specially summoned for the purpose, I should think that sufficient. Now it appears to me that what took place at the next general meeting was this:—There was a certain report made; that report referred to a balance-sheet which was read to the meeting; and in that balance-sheet, amongst the items to the debit of the company, there was this item:—"Loans, 6,000*l*." But the particulars of the loans did not appear; nor was there in the report or in the balance-sheet the

(a) 5 De G., M. & G. 746.

slightest allusion to the fact of there being a loan from a director.

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It is, however, stated that the attention of the shareholders at that meeting was called to the state of the several loan accounts, and particularly of the two loans from the *English and Scottish Assurance Company*, and to the transactions of the directors in respect thereof, and to the necessity which had forced the directors to obtain those loans, and that they were informed of the amount which had been written off the first loan from the *English and Scottish Assurance Company* in consequence of the death of Mr. *Brook*; and that the effect thereof was enlarged on by different persons present at such meeting, and the conduct of the directors in reference to such loans from the *English and Scottish Assurance Company* was unanimously approved by the shareholders. Now I collect from what is stated, that there was some conversation or discussion among the persons present at that meeting about these loans, and the circumstances under which they were contracted. I do not understand that it is meant to be represented either that the directors or the chairman Mr. *Baker* submitted to the consideration of the meeting the question whether it was a proper transaction, and whether they approved and confirmed it; but I will assume, in favor of the claimant, that it was talked about or discussed either by all or some of the parties present. But whilst I assume this, in the most favorable way for the claimant, to have taken place, can I assume that all the shareholders there present had the matter brought to their attention and submitted to their consideration, as one upon which they were to come to a decision as to whether they would approve and confirm it or not; and that, having that in their

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minds, they did by any resolution express their approbation of it? I cannot come to that conclusion. One of the affidavits indeed states that "the conduct of the directors in reference to such loans from the *English and Scottish Assurance Company* was unanimously approved by the shareholders." But that statement only comes to this: that nobody expressed any disapprobation; they talked about it, it may be that they all talked about it, and no one expressed disapprobation of the conduct of the directors. But were the terms of the contract submitted to them and approved and confirmed by the majority of their votes? So far from it, the affidavit fairly and candidly proceeds thus: "No resolution was submitted to the meeting because the directors believed that they were authorized to effect such loans, and that after the sanction given to the form of the loan obtained from the *Great Britain Insurance Company*, there was no necessity again to ask for a formal confirmation on the part of the shareholders beyond obtaining an expression of their approval." That is a very fair, and I have no doubt a correct, account of the transaction; but it does not satisfy the exigency of the Act of Parliament, and therefore I must come to the conclusion that there has been no such approval and confirmation as the Act requires.

Now supposing there had been a due confirmation of the contract according to the Act of Parliament, the effect would have been that the contract, as a contract, would have been binding on the company, irrespective of the manner in which the money was applied, and even though every farthing of it had been afterwards misapplied. But although for want of confirmation the contract is not binding upon the company as a contract,

still Mr. *Baker* may be entitled to recover the money, if he can show that it was duly applied in carrying on the business of the company. For if a director, finding that it is necessary for the carrying on of the business of the company that goods should be purchased, or that workmen should be employed and wages paid, or that other disbursements should be made, and that there are no available funds of the company at their bankers, should out of his own pocket advance the money necessary to carry on the business, and it is applied accordingly, he would have a right to recover that money; and in my opinion such a transaction would not be a contract within the meaning of the 29th section.

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Upon the whole I am of opinion that the claim of Mr. *Baker* by virtue of the contract must be disallowed; but he must be at liberty to establish a claim for so much of the sum in question as he can show to have been properly applied for the purposes of the company.

1860.
April 27, 28.

Will.

Construction.

Limitation over.
Condition.

Re GREEN'S ESTATE.

A testator bequeathed the residue of his estate to trustees upon trust to transfer one moiety to his sister, and the other moiety to his three brothers, *Richard, James Jenkinson and John*, and directed that "should not my said brother *Richard Green*, who is supposed to be now alive and resident in *Australia*, make any claim to the shares and interests in the said several trust-monies to which he may become entitled under this my will within the time or space of three years next after my decease," then the trustees were at the expiration of such three years to transfer "the shares and interests of the said *Richard Green*" unto his sister and two brothers, *James Jenkinson* and *John*, in equal shares. *Richard Green* died in the lifetime of the testator.

THIS was a petition under the statute 22 & 23 Vict. c. 35, s. 30, by the executors under the will of *George Frederick Green*, for the opinion, advice or direction of the Court as to who were entitled to the testator's residuary personal estate.

George Frederick Green, the testator, by his will dated the 21st of February, 1857, gave, devised and bequeathed all his real and personal estate of what nature and kind soever, and wheresoever the same might be at the time of his decease, and all his estate, right and interest therein, to two executors named in his will, their heirs, executors, administrators and assigns, and after declaring certain specific trusts relating to the same, proceeded as follows:—

"And as to the rest and residue of the said trust monies which shall remain after answering and satisfying the trusts and purposes hereinbefore declared of and concerning the same, I hereby declare that the said trustees or trustee for the time being of this my will do and shall stand possessed thereof upon trust as soon

three years next after my decease," then the trustees were at the expiration of such three years to transfer "the shares and interests of the said *Richard Green*" unto his sister and two brothers, *James Jenkinson* and *John*, in equal shares. *Richard Green* died in the lifetime of the testator.

Held, that *Richard Green's* share in the residue did not lapse by his death without claiming it, but that it passed by the gift over to the sister and two surviving brothers.

as may be conveniently after my decease, to pay, transfer and assign one moiety or equal half part thereof, and of the stock, funds and securities in or upon which the same shall be invested, unto my said sister *Ellen Green*, her executors, administrators and assigns, for her and their own absolute use and benefit; and upon trust to pay, transfer and assign the remaining moiety or equal half part thereof, and of the stock, funds and securities in or upon which the same shall be invested, unto and to be equally divided between my said brothers, *Richard Green*, *James Jenkinson Green* and *John Green*, their executors, administrators and assigns, *provided always, and I do hereby will and declare, that should not my said brother Richard Green, who is supposed to be now alive, and resident in Australia, make any claim to the shares and interests in the said several trust monies to which he may become entitled under this my will within the time or space of three years next after my decease, then and in such case the said trustees or trustee for the time being of this my will do and shall, at the expiration of the said period of three years, pay transfer and assign the said shares and interests of the said Richard Green in the said trust monies, and the stocks, funds and securities in or upon which the same shall be invested, and the interest, dividends and annual produce thereof, and all accumulations thereof, unto my said sister Ellen, and my said brothers James Jenkinson Green and John Green, their executors, administrators and assigns, in equal shares and proportions."*

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The testator died on the 18th of November, 1858.

Richard Green, one of the three brothers of the testator named in his will, died in the lifetime of the tes-

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tator. *James Jenkinson Green*, another brother, also died in the testator's lifetime.

The question was, whether the one-sixth share in the testator's residue which was given to *Richard Green*, who died in the lifetime of the testator, devolved as a lapsed legacy upon the testator's next of kin, or whether, by reason of the provision contained in the will for the event of *Richard's* not claiming the share intended for him within the three years of the testator's death, the share intended for him was distributable one-third to *Ellen Green*, one-third to *John Green*, and one-third to the next of kin in the place of *James Jenkinson Green*, who also died before the testator.

Mr. *Martineau*, who appeared for the executors, by whom the petition had been presented, took no part in the argument.

Mr. *Baily* and Mr. *Marten*, for the testator's next of kin, submitted that the share given to *Richard Green* on the failure of the conditions lapsed. The testator had in the gift over given over not a specific legacy or sum, but had only given the shares, or interests, to which *Richard Green* might become entitled; and *Richard Green*, in the events which had happened never having become entitled by claiming the share, there was nothing which could pass to the persons named in the gift over. They cited—*Bastin v. Watts* (a); *Rider v. Wager* (b); *Smith v. Oliver* (c); *Lenox v. Lenox* (d); *Hughes v. Ellis* (e).

(a) 3 Beav. 97.

(b) 2 P. W. 331.

(c) 11 Beav. 494.

(d) 10 Sim. 400.

(e) 20 Beav. 193.

Mr. *Shapter* and Mr. *Langley*, for the persons entitled under the gift over, contended that the testator intended to provide for the event of *Richard Green's* never becoming entitled, from whatever cause that might happen. The event of *Richard Green's* not claiming within three years must be read not as a strict condition, but as a conditional limitation, and the prior limitation being out of the case, the subsequent limitation must take effect.

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They cited *Jones v. Westcomb* (a); *Avelyn v. Ward* (b); *Warren v. Rudall* (c); *Scatterwood v. Edge* (d); *King v. Cleaveland* (e); *Jarvis v. Pond* (f); *Humphreys v. Howes* (g); *Willing v. Baine* (h); *Bebb v. Beckwith* (i).

Mr. *Baily* in reply.

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If the testator had stopped at the end of the first gift to the sister and brothers, without doubt the share of any one of the residuary legatees dying in the lifetime of the testator would have lapsed and gone over to the next of kin.

But then follows the proviso upon which the present question turns. The clause is as follows:—[His Honor then read the clause set out *ante*, page 69.]

The condition on which the share of *Richard* is given

(a) *Prec. in Chan.* 316.

(b) 1 *Ves. sen.* 420.

(c) 4 *Kay & J.* 603.

(d) 1 *Salk.* 229.

(e) 26 *Beav.* 26.

(f) 9 *Sim.* 549.

(g) 1 *Rus. & My.* 689.

(h) 3 *P. W.* 113.

(i) 2 *Beav.* 308.

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over to those three persons is *Richard's* not claiming that share within three years after the testator's death, which event (*Richard* having died before the testator) it is certain must happen.

The next of kin contend that the testator intended to give the share over only in the event of *Richard's* becoming entitled to the share under the bequest by surviving the testator, and omitting to claim it within three years; and that the testator did not intend that the condition should be fulfilled by *Richard's* dying in his own lifetime.

Let me first consider what would have been the effect of the clause without the words "supposed to be now alive and resident in *Australia*." To put a very simple case, if a testator gives a legacy of 100*l.* to his son *A.*, and if *A.* dies under twenty-one, then to *B.*, it is quite clear that if *A.* dies under twenty-one (whether he survive the testator or not), the legacy will be payable to *B.* So if legacies are given to each of the children of the testator, payable at twenty-one, and in the event of any of them dying under that age, the legacy of any one so dying is given to the survivors. If any of those persons die under that age, whether before or after the death of the testator, his legacy would go over to the survivors. That point was decided in *Willing v. Baine* (a), which Sir *John Leach* called a leading case; and the same point was decided in *Darrel v. Molesworth* (b), and in *Humberstone v. Stanton* (c), by Sir *William Grant*.

But it has been contended that though that may be so in the case of a particular legacy, yet in this case

(a) 3 P. W. 113.

(b) 2 Vern. 378.

(c) 1 Ves. & B. 385.

what is given over is not a legacy, but the share of the residue which was given to *Richard Green*; and that as *Richard Green* never took any interest in that share, it cannot go over; and in support of the proposition two cases have been cited. In one of those cases, *Bastin v. Watts(a)*, the Master of the Rolls, Lord *Langdale*, held that there was an intestacy as to the share given to the daughter, who died without issue before the youngest attained the age of twenty-one, at which time the share vested, being of opinion that there was a gift over of those shares only which had previously vested. I confess I do not see the force of the reasoning upon which the Master of the Rolls came to that conclusion; and none of the cases upon the question seem to have been referred to in that case.

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Another case cited on behalf of the next of kin was *Smith v. Oliver(b)*, and in that case again none of the cases upon the question were cited; and the Master of the Rolls, Lord *Langdale*, held that the children of a parent who had not survived the time of payment took nothing.

The case of *Walker v. Main(c)* is an authority directly the other way. In that case the testator gave to his four children all the residue and remainder of his money arising from the sale of his closes, to be divided equally between them by his trustee as soon as each of them should attain the age of twenty-one years or marry; and the testator then provided, that if any of his children should happen to die before the time of such legacy becoming due and payable, then he gave and bequeathed the share or part of such child or

(a) 3 Beav. 97.

(b) 11 Beav. 495.

(c) 1 Jac. & Wall. 1.

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ESTATE.

children so dying unto and among those that should be then living, share and share alike. Two of the daughters to whom shares had been given died in the testator's lifetime, and unmarried; and the Master of the Rolls, Sir *Thomas Plumer*, held that the shares of the daughters dying in the lifetime of the testator passed by the gift over.

There is also the case of *Humphreys v. Howes* (a), in which the testator gave certain trust monies to his two nephews, share and share alike; and provided, that if either of them died before his share in the trust monies became payable without leaving issue, the share of him so dying was to go to the survivor. Sir *John Leach* held that the share of one of the nephews who died in the testator's lifetime did not lapse, but went over to the surviving nephew.

These authorities appear to me decisive of the question. Moreover, in the present case the language used by the testator rather tends to show that he thought it possible that *Richard* might never become entitled to his share; for he provides that, in case *Richard* should not make any claim to the share to which he "*may*" become entitled, and not the share to which he "*is*" entitled. This, however, is but a slight circumstance.

I have hitherto left out of consideration the words, "supposed to be now living in *Australia*." Those words are sufficient to remove all doubt. They seem to me clearly to import that the testator, when he made his will, was uncertain whether *Richard* was living or dead. He *supposed* him to be living and in *Australia*,

(a) 1 Russ. & My. 639.

but he was not sure of the fact; and I cannot doubt that this uncertainty operated to produce in his mind the thought that he might never make any claim to his share, and that when he made the gift over he meant it to take effect, even if *Richard* was then already dead.

I am therefore of opinion that one moiety of the residue belongs to the sister under the first gift; and that one-third of the other moiety to which *Richard Green* would have been entitled did not lapse, but goes over in thirds, one third to the sister, another third to the brother *John*, and the remaining third (which would have gone to *James* if he had survived the testator) to the testator's next of kin.

Costs of all parties to be paid out of the residuary estate.

NOTE.—*Vide Hannam v. Sims*, 2 De G. & J. 151.

1860.

Re GREEN'S
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HOWKINS v. HOWKINS.

THIS was a motion for a writ of *ne exeat regno* under the following circumstances :—

Robert Gibson the elder by his will dated the 25th

It appeared that he had gone out of the jurisdiction to avoid answering ; that he had sold out the trust fund to an amount exceeding 20,000*l.* ; that he had come from *Boulogne* with a return ticket, and intended to depart shortly, and that he had in fact been arrested at the station on the day before the motion for a *ne exeat* was made, while attempting to depart. The order for a writ of *ne exeat* was made.

A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*.

April 26.

Ne Exeat.
Vested Interest
capable of being
divested.

A Defendant trustee was in contempt for not answering and out of the jurisdiction.

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 HOWKINS.

day of February, 1820, gave and bequeathed the sum of 15,000*l.*, and all accumulations thereof, to trustees in trust during the life of his daughter *Marian Gibson* to pay the interest dividends and annual income thereof to her for her separate use, without power of anticipation, and from and after her decease in trust for her child and children equally, with benefit of survivorship and accruer between or among such children as well as to surviving and accruing as to original shares, with a gift over in case all the daughters of the said *Marian Gibson* should die under the age of twenty-one, and without having been married, and all her sons should also die under that age, and without leaving lawful issue living at his or their death or born in due time afterwards.

Marian Gibson afterwards married *Theophilus Howkins*.

In May, 1859, a bill was filed on behalf of the infant children of *Theophilus* and *Marian Howkins*, by their next friend, against *Theophilus Howkins* and his wife and others, seeking an account of trust monies amounting to more than 23,000*l.*, which represented the sum of 15,000*l.* and accumulations so bequeathed to *Marian Howkins* and her children under the will of *Robert Gibson* the elder, and which monies had come into the hands of Mr. and Mrs. *Howkins* as his trustees.

The bill showed the title of the Plaintiffs as *cestuis que trust*, and alleged that the Defendants *Theophilus Howkins* and his wife had sold out the 23,000*l.* with the exception of about 149*l.*

A motion was now made for a writ of *ne exeat regno*

against the Defendant *Theophilus Howkins* on an affidavit verifying the following facts; that suits had been instituted in 1851 and 1852, to which *Theophilus Howkins* was one of the Defendants, and that on being served with a subpoena *Theophilus Howkins* and his wife had gone out of the jurisdiction to avoid answering; that attachments were issued against him and his wife, but they remained abroad and in contempt, and those suits were not prosecuted.

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 v.
 HOWKINS.

Arrangements were then attempted to be made, but failed, and the bill in the present suit was then filed.

It appeared from the affidavit in support of the motion that the Defendants had sold out all the fund except 149*l*.; that they had never put in any answers; and that before the 9th of August, when the time for answering expired, the Defendants left their residence, and went away to *Boulogne* for the purpose as the deponent believed of avoiding answering. That on the 31st of August, 1859, an attachment was issued, the Defendant still remaining abroad.

That on the 29th of April, 1860, the Defendant *T. Howkins* came from *Boulogne* to *London* for some temporary purpose with a return ticket from *Boulogne*, and that it was believed he intended without loss of time to return.

That the Defendant had on the 25th of April (the preceding day) been arrested on a *ca. sa.* a little before 8-30 a.m. in the morning, at the suit of some other person, whilst in the act of departing by the 8-30 a.m. train of that day, and that if he were allowed to depart the fund would in all probability be irrecoverably lost.

1860.

Howkins
v.
Howkins.

Mr. A. E. Miller, in support of the motion, cited *Jernegan v. Perkins* (a); *Etches v. Lance* (b), and *Collinson v. Anon.* (c).

The VICE-CHANCELLOR made the order, the Plaintiffs by their next friend giving the usual undertaking to answer damages.

The writ was marked for 20,000*l*.

May 5.

A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*.

Mr. Glasse now moved to discharge the writ of *ne exeat* which had been granted on the 26th of April, and submitted that the interest of the infant Plaintiffs, though a vested interest, being capable of being divested, was not such a debt or interest as would be sufficient to support a writ of *ne exeat*, it not being certain whether they would ever be entitled to receive anything. It was not a present interest, as none of the children would take anything until after the death of Mrs. *Howkins*. He cited *Daniels' Chancery Practice* (d); *Whitehouse v. Partridge* (e); *Jackson v. Petrie* (f); *Graves v. Griffiths* (g).

Mr. A. E. Miller, in support of the writ, contended that the Plaintiffs' interest differed from a merely *contingent* interest. Though it might on their not attaining twenty-one be divested, yet it was at present a vested interest, while a contingent interest would not become vested until the happening of the contingency on which it depended. The Plaintiffs had a present interest sufficient to support a *ne exeat*; *Russell v. Ashby* (h); *Boehm v. Wood* (i).

(a) T. & Russ. 97, n.

(b) 7 Ves. 96.

(c) 18 Ves. 353.

(d) Pages 1282-6 (3rd ed.)

(e) 3 Swans. 375.

(f) 10 Ves. 163.

(g) 1 Jac. & Wal. 646.

(h) 5 Ves. 96.

(i) T. & Russ. 332.

Mr. Glasse in reply.

1860.

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HOWKINS.

The VICE-CHANCELLOR.

The question is, whether the writ of *ne exeat* was properly granted in respect of the Plaintiffs' interest in the trust fund, which interest is so far contingent, that the Plaintiffs may possibly never become entitled to receive anything.

Now let me suppose, in the first place, that this interest of the Plaintiffs were incapable of being divested. In such a case there is no doubt that a bill would lie by the *cestuis que trust* against the trustee for a writ of *ne exeat*.

Then comes the question whether such a bill would lie where the interest, though vested, is capable of being divested. It does not appear to me that the fact of these interests being capable of being divested ought to make any difference. There is no decision on that point. It has indeed been decided that if a debt is contingent—that is, only to become due on the happening of a certain event, which may never happen—such a contingent debt is not a sufficient ground for granting a writ of *ne exeat*. But here the claim of these children cannot be said to be in respect of a debt (in the common acceptation of the term) due to them from the Defendant. Their interest is a present vested beneficial interest in the trust fund which the Defendant has misappropriated. And it appears to me that, whatever might be the proper decision if the children had no present vested interest, but their interest was simply contingent, their present vested interest is sufficient to support a *ne exeat*. They are *cestuis que trust*; and although they may possibly never receive anything,

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v.
HOWKINS.

they come within the principle of the Court interfering to protect the interests of persons having a present interest.

The motion must therefore be refused.

May 4.

Wife's Equity
to a Settlement.
Assignee.
Form of Settlement.
Costs.

WARD v. YATES.

Where a person entitled to a share in a fund in Court, and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee.

In giving effect to the wife's equity to a settlement of a fund in Court, the rule of settling half on the wife is departed from, either

where the fund is very small, and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance.

Where the fund settled by the Court has been assigned, the Court, after providing for the wife and her children, declares an ultimate trust, in case of the wife dying in the husband's lifetime without issue, in favor of the assignee.

THIS was the petition of *Elizabeth Stanely*, a married woman, by her next friend, for payment out of Court of two sums of 89*l.* 9*s.* 8*d.* and 149*l.* 19*s.* 8*d.*

Mary Icke, by her will dated the 6th of March, 1851, after directing payment of her debts, &c., gave and bequeathed all her personal estate to her three daughters, of whom the Petitioner *Elizabeth Stanley* was one.

By an indenture dated on the 22nd of June, 1852, *Charles Stanley* and the Petitioner *Elizabeth Stanley* his wife assigned to *Edmund E. Garbett* the one-third share of the Petitioner *Elizabeth Stanley* in the personal estate of *Mary Icke*, for his own absolute use and benefit; and by a subsequent assignment *Edmund E. Garbett* assigned the same share to *Aaron Smith* absolutely.

Mary Icke, the testatrix, having died in 1851, a suit was instituted for the administration of her estate, to which suit Mr. and Mrs. *Stanley* were parties. Mr. *Aaron Smith* was not a party to the suit, but he came in before the Chief Clerk in Chambers as assignee of the whole fund.

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By orders made on the suit coming on upon further consideration the costs of all parties were ordered to be taxed, and it was ordered that on such taxation one set of costs only should be allowed in respect of the share of the Petitioner *Elizabeth Stanley*, and that the amount of such costs should be carried to the credit of the cause, "The account of *Elizabeth Stanley* and her incumbrancer." And it was ordered that the residue of the fund representing the personal estate of the testatrix should be divided into three shares, and that one-third share should be paid into Court to the credit of "The account of *Elizabeth Stanley*."

The sum of 89*l.* 9*s.* 8*d.* standing to the credit of the cause "The account of *Elizabeth Stanley* and her incumbrancer," represented the amount of taxed costs of the suit in respect of Mrs. *Stanley's* one-third share in the testatrix's personal estate, and the sum of 149*l.* 19*s.* 8*d.* standing to the credit of the cause "The account of *Elizabeth Stanley*," represented the one-third share of Mrs. *Elizabeth Stanley* in the personal estate of the testatrix *Mary Icke*.

The questions were as to whether Mrs. *Elizabeth Stanley* or her incumbrancer were entitled to the costs of suit allowed in respect of her share, and whether Mrs. *Elizabeth Stanley* was entitled to any and what settlement of the fund in Court representing her share,
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or whether her incumbrancer, *Aaron Smith*, to whom the same had been assigned, was entitled to have the same paid to him.

It appeared that *Charles Stanley*, the husband of the Petitioner *Elizabeth Stanley*, had received upwards of 2,200*l.* in right of or through his wife; that he had been a bankrupt, and had twice taken the benefit of the Act for the Relief of Insolvent Debtors, and that he had no property or means of supporting his wife, the Petitioner, except such as he derived from his occasional employment as an attorney's clerk, which was very precarious.

Mr. *William Morris*, for the Petitioner, submitted that under the special circumstances of the case the Court would settle the whole of the fund, which was under 200*l.*, on Mrs. *Stanley*, as was done in *Re Kincaid's Trust* (a). The husband had already received a very large amount in right of his wife, and was now not in a position to maintain her properly; *Carter v. Taggart* (b). The Petitioner was entitled to the costs of the suit. One set only had been allowed in respect of her share, and the incumbrancer was not the proper party to protect it, as he knew it must be the subject of settlement.

Mr. *C. T. Swanston*, jun., on behalf of the incumbrancer, *Aaron Smith* (the Vice-Chancellor having intimated his opinion that the incumbrancer was entitled to the costs of suit allowed in respect of the share), submitted that if the Court did order any settlement, it would use its discretion, and that the Court would

(a) 1 Drew. 326.

(b) 5 De G. & S. 49; S. C.,
1 De G. M. & G. 286.

only settle one-half of the fund on Mrs. *Stanley*, and would order that the other half should be paid to the assignee who had given much more than its value for it; *Napier v. Napier* (a); *Bagshaw v. Winter* (b).

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v.
YATES.

The VICE-CHANCELLOR.

At one time there was a fluctuation of opinion on the question of costs where a person entitled to a share in a fund and his incumbrancer are before the Court, and one set of costs only is allowed in respect of that share, the question being whether the incumbrancer should have those costs, or should add his costs to his incumbrance. I think the incumbrancer should have them, and that is now the practice. It seems very unreasonable that the expense which has arisen out of the circumstances of the mortgaged property should be thrown on the mortgagee; and if he is obliged to add his costs to his principal and interest, then in cases where, as in the present, the fund proves insufficient, he would lose the costs.

Where, as in the present case, there has been an absolute assignment, there is yet stronger reason why the costs should be paid to the assignee, and not to the assignor. It has been contended that *Aaron Smith* need not have attended at Chambers, as Mrs. *Elizabeth Stanley* was there to protect the fund; but having assigned it, the fund belonged to *Aaron Smith*, and Mrs. *Elizabeth Stanley* had no interest in it except her equity to a settlement.

Upon the other point I have no doubt that in a case like the present, the whole of the fund should be settled

(a) 1 Dr. & War. 407.

(b) 5 De G. & Sm. 466.

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on the wife. The usual practice of the Court, in the absence of any special reason, is to settle one-half on the wife; but in this case there are two reasons why that rule should be departed from. First, the extreme smallness of the fund, which alone would be a sufficient reason, the husband not being in a position to maintain his wife; and secondly, the fact that the husband has received a much larger amount in right of his wife, out of which there has been no appropriation made for the maintenance of the wife.

I think, therefore, that the costs of the suit in respect of the share must be paid to the assignee, and that the whole of the fund must be settled on the Petitioner Mrs. *Elizabeth Stanley*. The costs of the petition must be paid out of the fund.

[The Registrar (Mr. *Munro*) having referred to the case of *Gent v. Harris*, referred to in *Seton on Decrees* (a), as to the form of the settlement:]

The VICE-CHANCELLOR said the fund must be settled on Mrs. *Elizabeth Stanley* for life, and during her present coverture for her separate use, without power of anticipation; and after her decease for all the children of her present marriage who should attain twenty-one, or, being daughters, should marry under that age, equally; and if there should be no such child, and she should survive her present husband, in trust for her, her executors, administrators and assigns; but if she should die in the lifetime of her said husband without any child, in trust for *Aaron Smith*, the assignee of the share.

(a) Page 331.

1860.
March 20 &
May 8.

Will.

Construction.
Next of Kin.

LEE v. LEE.

THIS was a suit for carrying into effect the trusts of the will of *James Lee*, dated in 1852. At the date of the will the testator's brother, *R. L. Lee*, was living, but he died before the testator, and *Ann Lee*, to whom a life estate was given, was the testator's daughter, and living at his death.

A gift of a life estate to a person who would be the testator's next of kin at his death, with remainder over to his next of kin, excluding some of the persons who would be some of his next of kin, does not exclude the donee of the life estate from taking under the gift to the next of kin.

The will contained the following clause, as to a certain portion of residue now in question. After giving it to his daughter *Ann Lee* for life, he gave it after her death "upon trust to divide such residue unto and equally among my next of kin, but exclusive of my said nephew *Leonard Lee*, and my said nieces *Mary Jane Lee* and *Emma Lee*, according to the statute for the distribution of personal estates in case of a party dying intestate."

The question was whether this clause and the gift of a life estate to *Ann Lee* excluded her from taking as next of kin.

Mr. *Wickens* for the Plaintiff.

Mr. *E. R. Turner* for the widow of the testator.

Mr. *Currey*, for *Ann Lee*, cited *Ware v. Rowland* (a); *Urquhart v. Urquhart* (b); *Bird v. Luckie* (c).

(a) 2 Phil. 635.

(b) 13 Sim. 613.

(c) 8 Hare, 301.

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Mr. *Baily* for the next of kin on the assumption that *Ann Lee* was excluded; *Elmsley v. Young* (a); *Attorney-General v. Lawes* (b).

The VICE-CHANCELLOR.

I will first consider what would be the effect of the bequest if the clause excluding the nephew and two nieces had been omitted, and it had been merely a bequest in trust for the daughter for life, and from and after her decease upon trust for the testator's next of kin.

And for the purpose of considering this question on principle, I will premise one or two general rules, about which there can be no question.

It is a general rule that in the case of a simple bequest in trust for a class of persons (without any previous life estate), all those, and those only, who answer the description of the class at the testator's death will be entitled. Thus a bequest in trust for the testator's next of kin, is a gift to the persons who answer the description of next of kin at the testator's death, and none others. And so a simple bequest in trust for the children of *B.* is a gift to the children of *B.* living at the testator's death, and none others.

Next, if we introduce the element of a prior life estate, it is a general rule that a bequest in trust for *A.* for life, and from and after his death in trust for other persons *nominatim*, is an immediate bequest to the persons in whose favor the ulterior gift is made, subject to the life interest given to *A.*; and those persons take immediate vested interests, transmissible to their representatives, although they may die before *A.* And the same general rule prevails in the case of a bequest in (a) 2 M. & K. 82, 780; 2 Jarm. Wills, p. 210. (b) 8 Hare, 32.

trust for *A.* for life and from and after his death in trust for a class of persons, as for example the testator's next of kin; this is an immediate gift to the persons answering the description of the testator's next of kin at his death, subject to the life interest given to *A.* The gift of the previous life interest to *A.* does not postpone the period at which the persons answering the description of next of kin are to be ascertained. The persons answering the description of next of kin at the death of the testator take an immediate vested interest subject only to the life interest of *A.* And whether the testator in giving the fund to the next of kin uses the language "from and after the death of *A.*" or "subject to the life interest of *A.*," the result is the same.

It is true that to a certain extent an exception is made to this general rule in the case of a bequest to *A.*, for life, and after *A.*'s death to the children of *B.*; for in such case all the children of *B.* who come into existence before the death of *A.* (the period of distribution) are let in to share. But this exception is founded on a special reason, namely, the desire of the Court to let in as many of the children as possible, upon the assumption that such would be the desire of the testator. And this exception applies for the same reason where the gift, instead of being to children, is to grand-children or brothers and sisters. This exception, being founded on a special reason, so far from derogating from the general rule, in truth establishes and confirms it, according to the maxim, *exceptio probat regulam*. It is however to be particularly noted that this exception does not go to the extent of postponing till the death of *A.* the period for ascertaining the persons answering the description, so as to include only those who answer the description at the death of *A.* The children living at the testator's

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death still take, and they take vested interests transmissible to their representatives; subject only to be divested *pro tanto* in order to let in others of the same class who may be born during *A.*'s life; the only effect of the exception is that, in addition to those persons who answer the description at the testator's death, others who may come into *esse* previously to the period of distribution are let in to participate.

Having premised these general rules which do not admit of controversy at the present day, I now come to that which more closely touches the question which is now to be decided.

An opinion has been entertained by some that in the case before put of a bequest in trust for *A.* for life, and from and after his death (or subject to his life interest) in trust for the testator's next of kin, admitting that in an ordinary case the persons entitled under the ulterior gift would be those who answer the description of the testator's next of kin at his death, yet if *A.* the tenant for life happens to be the next of kin of the testator, a different construction must be put upon the words "next of kin," and that the persons who in that case are to take under the ulterior gift are those who shall answer the description of the testator's next of kin, not at his (the testator's) death, but at the death of *A.* the tenant for life, *i. e.*, those persons who would have been the testator's next of kin if he had lived till the death of *A.* The reasoning on which this opinion is founded is this, that it is impossible to suppose that the testator intended *A.* to have any interest in the property beyond the life interest given to him expressly by the will; that therefore *A.* must be excluded from taking under the gift to the next

of kin; and that in order to effect that exclusion, the gift to the next of kin shall be held to mean a gift to those persons who shall answer the description of next of kin at the death of *A*.

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With all deference I confess this reasoning does not appear to me to be sound. It resolves itself into two distinct conclusions:—1st. That *A*. ought to be excluded from taking under the gift to the next of kin, because of the assumed impossibility of supposing that the testator intends him to have any thing more than the life interest; and 2ndly. That the exclusion of *A*. ought to be effected by postponing till the death of *A*. the period at which the persons answering the description of the testator's next of kin shall be ascertained.

With respect to the first of these conclusions, I may observe that (as a general rule) if a testator bequeaths property to a class by a particular description, and a question arises whether a certain individual who comes within the description ought or ought not to be excluded, it is not sufficient, in order to exclude him, to show the absence of a special intention to *include* him; you must show a clear and unambiguous indication of an intention to *exclude* him. Does then the gift of a life interest to *A*., who is the next of kin, or one of the next of kin, afford a clear and unambiguous indication of an intention to exclude him from taking any further benefit under the ulterior gift to the next of kin? I confess it does not appear to me at all absurd or unreasonable that a person who takes a life interest by virtue of a particular gift to him *nominatim* should also take a further interest either alone or jointly with others as the case may be, under a gift in the same will to a class, which class as described by the testator clearly includes

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him. In truth it cannot be said that the testator, when he made the ulterior gift to his next of kin, had any special intention one way or the other. He did not concern himself with the consideration of the question *who* would be his next of kin. All he intended was that at all events *A.* should have a life estate, and then that the property should go to his next of kin, whoever he, she or they might happen to be. In *Seifferth v. Badham* (a), Lord *Langdale* observes, "At the time when the will is made, it is necessarily uncertain who will be the testator's next of kin at the time of his death. If, at the date of his will, he has children who are then his next of kin, they may die before him, and give place to his brothers and sisters. If, at the date of his will, he has brothers and sisters, he may afterwards have children born, who, at the time of his death, may displace the brothers and sisters. Contingencies of this sort are infinite, and in general, it is perhaps probable that the testator, in such cases, means only to provide for those whom he does mean to benefit in the way he thinks best, and then to add, that if events defeat that particular intention the law may take its course."

But whatever may be thought of the first of the two conclusions before mentioned, it appears to me that there is still less reason for the second, which is, that in order to accomplish the exclusion of *A.*, the period for ascertaining the persons answering the description of the testator's next of kin must be postponed till the death of *A.* It appears to me that, according to plain reason, if *A.* must be excluded, the proper way to effect that object would be simply to exclude him, and to hold that the persons to take under the gift to the next of

(a) 9 Beav. 374.

kin should be, those who would answer the description at the testator's death if *A.* were altogether left out of consideration, in fact as if *A.* did not exist. If there is ground for concluding that it was the testator's intention to exclude *A.* from taking under the gift to the testator's next of kin, why should not the matter stand on the same footing as if the testator had expressed that intention in so many words. Now if the testator had in express terms bequeathed to *A.* for life, and after *A.*'s death to the testator's next of kin excluding *A.*, would the Court in that case hold that the period for ascertaining the next of kin should be postponed till *A.*'s death, and that the persons who ought to take under the ulterior gift to the testator's next of kin were those who should answer that description at the death of *A.*? I apprehend clearly not. In that case I have no doubt that the persons to take would be the persons who would have been the next of kin at the testator's death if *A.* did not exist. And I cannot see why, because *A.* is to be excluded, others are also to be excluded. Suppose that in the case put *A.* was the testator's only child, and that he had also, at the date of his will and at his death, two nephews, who would be his next of kin if *A.* did not exist:—why should we, in order to exclude *A.*, exclude also the two nephews, who may perhaps afterwards die before *A.*, so that at *A.*'s death other relations in a more remote degree of consanguinity to the testator might be his next of kin? Or to put the illustration in a still more striking point of view,—suppose that at the date of the will *A.* was the testator's only child, and that after the date of the will the testator had other children born who survived him, and who would of course be his next of kin at his death; then if in order to exclude *A.* the period for ascertaining the next of kin is to be post-

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poned till *A.*'s death, the testator's other children would be excluded unless they should happen to survive *A.*, and more remote relations living at *A.*'s death would take. Surely such a construction of the will as this would produce a result which would be quite contrary to the testator's intention.

For these reasons (and perhaps others might be suggested) it appears to me that in the case of a bequest in trust for *A.* for life, and from and after his death in trust for the testator's next of kin, *A.* being himself the next of kin, or one of the next of kin, there is no reason for holding that *A.* would be precluded by the gift to him of the life estate from taking under the gift to the next of kin,—nor for holding that the next of kin who are to take are those who may be such at the death of *A.*

How, then, does the question stand upon authority? The precise question came before Lord *Alvanley*, in *Holloway v. Holloway* (a). In that case—[His Honor stated the case, and quoted the passages near the end of p. 401, and the passage at the end of p. 402.]

There are two cases decided by Sir *W. Grant* which it is difficult to reconcile with *Holloway v. Holloway*. The first is *Jones v. Colbeck* (b); the other is *Miller v. Eaton* (c). [His Honor referred to the facts of these cases.] There are also some decisions by Sir *John Leach*, which are opposed to *Holloway v. Holloway*. But when the question came before Lord *Cottenham* in *Ware v. Rowland* (d), he upheld the principle of *Holloway v. Holloway*, and intimated in a manner not to be misunderstood his dissent from *Jones v. Colbeck*

(a) 5 Ves. 399.

(b) 8 Ves. 38.

(c) Sir George Cooper's Reports, 272.

(d) 2 Phil. 635.

and *Miller v. Eaton*. [His Honor referred to the passage in page 639, at the bottom of the page.] *Urquhart v. Urquhart* (a) was decided by Sir L. Shadwell in accordance with the principle maintained by Lord *Alvanley* and Lord *Cottenham*. And upon the same principle Lord *Langdale* decided *Seifferth v. Badham* (b). The case of *Pearce v. Vincent* (c), as ultimately decided, is a strong authority against the exclusion of the daughter. Upon the whole I am of opinion, both upon principle and upon authority, that in the case now before me, if the passage excluding the nephew and nieces had been omitted, the Defendant *Ann Lee*, being the only child and next of kin of the testator, would have been entitled to take under the gift to the next of kin, notwithstanding the previous life estate given to her.

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And I think that neither the words "pay and divide," nor the words "between and amongst," which seem to import a plurality of next of kin, are sufficient to affect that conclusion.

It remains to consider the effect of the clause in the will excluding the nephew and two nieces. The testator's motive for excluding them probably was that he had in a previous part of the will given to each of them a legacy of 500*l*.

The question is whether this exclusion of the nephew and two nieces affords a clear and unambiguous indication of an intention to exclude the daughter from taking under the gift to the testator's next of kin. The argument for the exclusion of the daughter, founded on this passage in the will, is in substance this: it is in-

(a) 13 Sim. 613.

(b) 9 Beav. 370.

(c) 2 Keene, 230.

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insisted, and very justly, that the question, being a question of intention, must be tried with reference to the circumstances existing at the date of the will. It is further insisted, and with equal justice, that the testator must be presumed to have known that if the same state of circumstances which existed at the date of the will should exist also at the testator's death, his daughter would be his sole next of kin, and that if she were excluded, his next of kin at his death would be his brothers and sisters, and his nephews and nieces the children of any deceased brothers and sisters. And it is further insisted that upon the question whether the daughter was or was not intended to be excluded from taking under the gift to the next of kin, the express exclusion of some of those persons who at that time would be his next of kin if the daughter were excluded is a clear indication of his intention to exclude the daughter, and to use the term "my next of kin" as denoting that class of persons who would have been then the next of kin if the daughter were excluded, which class would have included the nephew and two nieces if they had not been expressly excluded. And it is insisted, moreover, that this argument is strongly supported by the testator's use of the words "pay and divide," and of the words "unto and amongst," which import a plurality of persons intended to take.

This argument appears to me to have much force. For undoubtedly if a testator makes a gift to a class by a particular description, and excepts certain individuals by name, there is ground for contending that by the description of the class he meant *that* class of persons which would have included the persons specially excepted if they had not been so excepted. At the same time I cannot help observing that it may perhaps admit

of doubt whether, in the case before the Court, the exception of some of the persons who at the date of the will constituted the class which would have been the testator's next of kin if the daughter were excluded, affords a clear and unambiguous indication of an intention to exclude her. Undoubtedly it would do so, if we assume that the testator when making his will regarded it as certain that the state of his family would remain precisely the same at his death as at the date of his will. But to assume this, is to assume that he was not possessed of the most ordinary faculty of observation, and that he was utterly insensible to those events which from his youth upwards were constantly passing around him, which would show the complete uncertainty of human life. A testator when making his will must be aware, not only that the duration of his own life is most uncertain, but also that it is altogether uncertain whether any given individual of his family will survive himself. He may indeed regard it as probable, even *highly* probable, that a certain relation, his only child for instance, will survive him, and he may make a provision for such child in the hope or expectation of that event occurring; but to assume that he regarded that event as certain seems to me to be contrary to reason and common sense. Why are we to assume that it was not present to the mind of the testator that his daughter might pre-decease him? And if it was, or may have been so, may he not have introduced the clause excluding the nephew and two nieces with this view, that if his daughter should happen to die before him, and his brothers and sisters and his nephews and nieces the children of deceased brothers and sisters should happen to be his next of kin, then and in that case the nephew and nieces, whom he names, should be excluded from participating with the others. And

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if these observations are at all founded in reason, it may well be questioned whether the express exclusion of the nephew and nieces affords a clear and unambiguous indication of an intention to exclude the daughter from taking under the bequest to the next of kin.

But it is unnecessary to pursue these observations further, because whatever weight might be due to the argument itself which I am now considering, the foundation fails upon which it is based. The argument is founded upon the assumption that the nephew and two nieces who are expressly excluded were at the date of the will some of the persons who then constituted the class of next of kin if the daughter were excluded, it having been assumed that they were children of a then deceased brother. That assumption turns out to be a mistake as to the fact. The fact is that at the date of the will the testator's brother, *Richard Leonard Lee*, the father of the nephew and two nieces who are expressly excluded, was living, though he afterwards died in the testator's life. So that the excluded nephew and nieces were not at the date of the will comprised in the class of the testator's next of kin, supposing the daughter were left out of consideration. It is clear, then, that the testator in excluding the nephew and nieces, the children of his brother, *Richard Leonard Lee*, had reference only to the possibility that events might so turn out as thereafter to bring the nephew and nieces, whom he wished to exclude, within the class of his next of kin. And if when making his will he was (as he clearly must have been) contemplating the death of his brother, *Richard Leonard Lee*, as one of those possible events, why are we to assume that he was not also contemplating the death of his daughter as another

of those possible events? It is certain that he had in his mind the possibility of changes taking place in the state of his family by death; and there is no reason for assuming, that the possibility of his daughter's death in his lifetime was not as much present to his mind as the possibility of his brother dying before him.

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I am therefore of opinion that the passage in the will, excluding the nephew and two nieces, does not afford any sufficient indication of the testator's intention to exclude his daughter from taking under the gift to the next of kin.

I must declare that the daughter is not excluded from taking under the gift to the next of kin; and the rest of the decree will be in accordance with that declaration.

Re JARVIS'S CHARITY.

THIS petition was presented for the appointment of new trustees for the management of *Jarvis's Charity*, and the question was, whether, under the 17th section of the Charitable Trusts Act, 1853(a), it was necessary that the certificate of the Charity Commissioners should have been obtained before the petition was presented.

(a) The 17th sect. of the 16 & 17 Vict. c. 137, is as follows:—"Before any suit, petition or other proceeding

(not being an application in any suit or matter actually pending) for obtaining any relief, order or direction con-

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When a final order has been made on a petition, it can no longer be said to be a matter "actually pending" for the purposes of the 16 & 17 Vict. c. 137, s. 17.

Therefore, where a petition was presented for the appointment of new trustees under a scheme ordered and settled by the Court upon a petition presented in 1854, the Court required the certificate of the Charity Commissioners to such petition.

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It appeared that in 1841, an information was filed, and that in the following year, 1842, a decree was made referring it to the Master to settle a scheme for the regulation of the charity. In 1852, an Act of Parliament, which had been applied for under an order of the Court of Chancery, was passed, referring it to the Court of Chancery to settle a scheme for the administration of the charity; and in 1854, a petition was presented to the Court on which an order was made for a scheme.

cerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken, by any person whomsoever, there shall be transmitted by such person to the said board notice in writing of such proposed suit, petition or proceeding, and such statement, information or particulars as may be requisite or proper, or may be required from time to time by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may by an order or certificate signed by their secretary authorize or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity, either for the objects and in such manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or

provisions for the protection or benefit of the charity, as the said board may think proper; and such board, if it seem proper to them, may by such order or certificate as aforesaid require and direct that any proceeding so authorized by them in respect of any charity shall be delayed during such period as shall seem proper to, and shall be directed by, such board; and every such order or certificate may be in such form, and may contain such statements and particulars, as such board shall think fit; and (save as herein otherwise provided) no suit, petition or other proceeding for obtaining any such relief, order or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon, and in conformity with, an order or certificate of the said board: provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

The scheme settled by the Court provided that the charity should be managed by trustees; and it being necessary in pursuance of the provisions of the Act of Parliament that new trustees should be appointed, the present petition was presented for that purpose. The petition also prayed that a regulation requiring that four trustees should be present to form a quorum should be altered by making three trustees a quorum.

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Mr. C. P. Cooper and Mr. Hobhouse, in support of the petition, submitted that the petition, being for the appointment of new trustees, was merely carrying out the scheme under which the charity was being administered, and was in fact made in a matter or suit actually pending within the meaning of the 17th section of the Charitable Trusts Act (*a*), and therefore that the certificate of the Charity Commissioners was not necessary; *Lister's Hospital* (*b*); *Re St. Giles and Bloomsbury Volunteer Corps* (*c*).

Mr. T. H. Terrell (for the Attorney-General) submitted that it was necessary to obtain the certificate of the Charity Commissioners before making an application to the Court, even when such application was authorized by a special act; *Ford's Charity* (*d*); *Bingley School Case* (*e*).

Mr. C. P. Cooper, in reply.

The VICE-CHANCELLOR.

The question is, whether this petition is presented in a "suit or matter actually pending" within the meaning

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| (a) 16 & 17 Vict. c. 137. | (d) 3 Drew. 324. |
| (b) 6 De G., M. & G. 184. | (e) 18 Jur. 668. |
| (c) 25 Beav. 318. | |

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of the 17th section of the Charitable Trusts Act (a), as if it is it does not require, as it otherwise would, the sanction and certificate of the Charity Commissioners.

If a petition is presented in a matter and an order is made on that petition, which is in effect a final order, upon which it is not necessary to come back to the Court, I do not see how such a petition can be considered as actually pending. If it were to be so considered the effect would be, that whenever a petition has been presented it would be always actually pending. There must be some limit, and the question is when it shall be considered as no longer actually pending. When a final order has been made on a petition it can no longer be said to be actually pending. The Legislature in the section in question has not merely said "pending," but has added the word *actually* pending, with the special meaning, that it is some matter or suit in which there is something still remaining to be done by the Court.

The authorities which have been referred to do not appear to me to touch the case. They are cases in which money has been paid into Court, and the question has been whether it was necessary for the charity trustees to go to the Commissioners before getting the money paid out to them.

The object of the act was to put an end to the improper system pursued by certain solicitors who had made charities their stock-in-trade for creating costs.

The present petition appears to be a distinct and new

(a) 16 & 17 Vict. c. 137.

application, and in my opinion it is not made in a "suit or matter actually pending" within the terms of the Act of Parliament.

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The petition also seeks a slight alteration in the regulation as to the number of trustees necessary to form a quorum. That is certainly a new application, and not a continuance of any former application or proceeding.

I must therefore require the certificate of the Charity Commissioners.

Dec. 2, 3.
7 & 8 Vict.
c. 110, s. 68.
Injunction.
Proceeding
against Share-
holder for Debt
due from
Company.

HARDINGE v. WEBSTER.

THIS was a motion for an injunction to restrain the Defendant *Webster* from taking proceedings at law under the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, s. 68, to recover as against Dr. *Hardinge*, who was the holder of twenty shares in the *Anglo Australian Company*, a debt due from that company to Mr. *Webster*.

A shareholder in a company, who was also a creditor of the company, obtained judgments against the company for money due to him. The assets of the company

had been assigned to another company, of which he had become a shareholder; and not being able to obtain payment of his debt, he gave notice under the 68th section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110) to another shareholder in the first company, who had not become a shareholder in the second company, that he should proceed against him individually to recover the debt.

Upon a bill for an injunction by the shareholder so proceeded against, to restrain the proceedings at law, but without asking for other relief:

Held, that a Court of Common Law had full jurisdiction to deal with the case, and the injunction was refused with costs.

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Mr. *Webster*, who was a creditor of the *Anglo-Australian Company* for a sum of about 2,000*l.*, and who also held 500 shares in the company, brought an action against the company for the amount of his debt. The company in defence to this action pleaded three pleas: 1st, that they were never indebted, 2nd, that they had discharged the Plaintiff's claim by payment, and 3rd, that they had a set-off. In that action a verdict passed for the Plaintiff, subject to an arbitration and award of a Mr. *Raymond*, who was empowered to say that there should be a verdict for the Defendant, and that there should be a nonsuit, and he was to be at liberty, if he thought fit, to say what was just and fair between the parties, and if there were any questions of law about which he thought there was sufficient difficulty, he was empowered to state a case for the opinion of the Court of Common Pleas.

The matter was argued before Mr. *Raymond*, and he was urged to award that it was not fair and just between the parties that Mr. *Webster* should be at liberty to have execution against one of the individual shareholders of the company in case the assets of the company should be insufficient to satisfy the claim. Mr. *Raymond* refused to make such an award, but determined that the verdict found for the Plaintiff should stand, but that it should be reduced to 1,642*l.* 3*s.* 9*d.*, and that the cost of the reference should be paid by the company.

The whole of the assets and liabilities of the *Anglo-Australian Company* had been transferred by the directors (of whom Mr. *Webster* was one) to the *British Provident Society*.

Mr. *Webster*, not being able to obtain satisfaction of his claim from the company, gave notice to Dr. *Hardinge* in accordance with the 68th section of the 7 & 8 Vict. c. 110, that upon the expiration of ten days from the service of the notice a motion would be made in the Court of Common Pleas, or an application to one of the judges, for a summons calling upon Dr. *Hardinge* to show cause why execution should not issue against him upon that judgment.

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Dr. *Hardinge* thereupon filed this bill for an injunction to restrain the Defendant *Webster* from proceeding at law in pursuance of the notice so served on Dr. *Hardinge*.

Mr. *Baily* and Mr. *Stevens* in support of the motion.

The proceedings the Plaintiff seeks by this motion to stay are taken under the 68th section of the Joint-Stock Companies Registration Act (a), and are in fact pro-

(a) The 68th sect. of the 7 & 8 Vict. c. 110, enacts as follows:—"That in the cases provided by this Act for execution on any judgment, decree or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company, or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any monies, damages, costs and expenses paid or incurred by him as aforesaid in any action or suit against the company, such

execution may be issued by leave of the Court, or of a judge of the Court, in which such judgment, decree or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons, consistent with the practice of the Court, without any suggestion or *scire facias* in that behalf; and that it shall be lawful for such Court or Judge to make absolute or discharge such rule or allow or dismiss such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such other

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ceedings by one shareholder or partner against another shareholder or partner in the same company in respect of a debt due from that company or partnership, and this a Court of Equity will not permit.

The debt being one due from the company, all the shareholders are under the deed of settlement of the company rateably liable to contribute towards it, and it is not equitable that Mr. *Webster*, who holds 500 shares in the company, should be allowed to re-issue execution for this debt against the Plaintiff who holds only twenty shares.

The primary funds out of which the debt would be payable are the assets of the company, but they have been transferred to another company, and it is inequitable that Mr. *Webster*, who as a director consented to that transfer, should now be allowed to proceed to recover against an individual shareholder.

Mr. *Glasse* and Mr. *Shebbeare* for the Defendant *Webster*.

order therein as to such Court or judge shall seem fit, and in such cases such form of writs of execution shall be sued out of the courts of law and equity respectively, for giving effect to the provision in that behalf aforesaid, as the judges of such Court respectively shall from time to time think fit to order, and the execution of such writs shall be enforced in like manner as writs of execution are now enforced : provided that any

order made by a judge as aforesaid may be discharged or varied by the Court on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder until ten days' notice thereof shall have been given to the person sought to be charged thereby."

The Court will not interfere to restrain the Defendant from proceeding at law. He is proceeding under the provisions of an Act of Parliament, and has taken all the preliminary steps required by the act. There is an express proviso in that act for the case of a shareholder in a company who is also a creditor taking proceedings against another shareholder, and the Court will not restrain those proceedings; *Hammond v. Ward* (a).

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Mr. *Baily*, in reply.

The VICE-CHANCELLOR.

[After stating the facts to the effect above set out :]—

The 68th section of the 7 & 8 Vict. c. 110, prescribes a course the first step of which has been already taken, and enacts, that it shall be lawful for a Court of Law or for a judge of that Court to make absolute or discharge a rule obtained in pursuance of that section or wholly to dismiss the motion, and direct the costs to be paid by either party or to make such other order as the Court or judge may think fit. That is the power given by the act to the Court or judge at law on the application which will be made by the Defendant *Webster*, unless the Plaintiff in this suit succeeds in obtaining the injunction he seeks.

The Plaintiff's bill is simply confined to a prayer for an injunction. It is not a bill by which Dr. *Hardinge*, admitting that *Webster* is a creditor of the company and that he himself is a shareholder, insists that *Webster* and many other persons are also shareholders, and that therefore, though it is just that *Webster's* debt should

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be paid, it is also just that all the shareholders should contribute *pro rata* to pay the debt, and that he is willing to make his contribution towards it; but Dr. *Hardinge* simply says "Don't let Mr. *Webster* attempt to recover the debt against me under this proceeding or under any other proceeding in a Court of Law."

If there is any ground for coming to this Court, of course it must be an equitable ground. Dr. *Hardinge* has no right to come here if there is a good defence at law or if it is competent to him on the hearing of the application to the Court of Law to bring forward those reasons upon which he now contends that he ought not to be made liable for the debt or for more than a certain portion of it.

What then is his equity for coming to the Court? First he says, that Mr. *Webster* himself is one of the shareholders as well as Dr. *Hardinge*, and that it is in effect one partner or co-shareholder trying to take legal proceedings to recover a debt from another partner or co-shareholder. But if it be not the law that he is entitled to do so, that is a defence to the proceeding at law, and it is quite as competent to a judge at common law as to this Court to judge of that matter, and a Court of equity will not stay proceedings at law on that ground.

It was however suggested, (and this certainly at first sight wears more the semblance of an equitable ground,) that not only is Mr. *Webster* a partner in the concern, but that the debt due to him is a debt due from the company of which many other persons were members, that all ought to contribute their respective proportions of the debt, and therefore that it would be

against justice that Mr. *Webster* should recover the whole from Dr. *Hardinge*. Now that begs the whole question; for it assumes that a Court of Law must determine that Dr. *Hardinge* shall pay the whole debt. Even if that be the result, the Act of Parliament has imposed it. But I apprehend that the very purpose and object of the act was to enable a Court of Law to determine to what extent, or whether at all, a shareholder should be made liable on this proceeding, which is by way of substitute for *scire facias*. It will be Dr. *Hardinge's* fault if he does not bring all the circumstances of the case before the Court of Law. If the Court should take the view that the Act of Parliament had imposed upon it the necessity of making Dr. *Hardinge* liable to Mr. *Webster* for the whole of the debt, even in that case Dr. *Hardinge* could not come and ask the interference of this Court. But I have not the smallest doubt that a Court of Law will exercise a judgment and discretion on the question to what extent Dr. *Hardinge* ought under all the circumstances to be made liable, and will only allow execution to issue to that extent.

It was further suggested, that the debt ought to have been paid out of the assets of the *Anglo-Australian Company*, but that all the assets of the *Anglo-Australian Company* had been assigned and transferred to the *British Provident Company* upon the amalgamation of the two companies; that Mr. *Webster* concurred in that arrangement, and therefore that he ought not now to come upon Dr. *Hardinge*, an individual shareholder, to pay any portion of it. Now, with respect to the allegation that Mr. *Webster* concurred in the arrangement between the two companies, the facts are these:—At a meeting of the members of the *Anglo-Australian Com-*

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pany a resolution was proposed for giving power to the directors to amalgamate with the *British Provident Company*. On that occasion Mr. *Webster* objected to the resolution, and insisted that their secretary should first examine the affairs of the *British Provident Company*, but he was overruled and the resolution was passed; and an agreement was come to between the two companies, that all the assets and liabilities of the *Anglo-Australian Company* should be handed over to the *British Provident Company*. It is true that Mr. *Webster*, after the amalgamation had been agreed upon, filed a bill to carry out the arrangement between the companies, but that was quite consistent with his having objected to the amalgamation until it was actually determined upon and agreed to. Dr. *Hardinge* on the other hand not only entirely concurred in the arrangement, but he availed himself of that portion of it which enabled shareholders in the *Anglo-Australian Company* to become shareholders in the *British Provident Company*, and has become a shareholder in the new company, and as such, he is one of the persons to whom the assets of the *Anglo-Australian Company* have been handed over, and who undertook to pay all the debts of that company; but Mr. *Webster* has not become a shareholder in the amalgamated company. Therefore, all that has taken place, so far from being a reason why Mr. *Webster* should not be entitled to recover something at least from Dr. *Hardinge* appears to me to afford the strongest reason why he should.

It is further argued, that it is unjust for Mr. *Webster* to endeavour to make another shareholder in the *Anglo-Australian Company* liable for a debt due from the company, inasmuch as all its property has been transferred to the *British Provident Company*, and therefore

the latter company is alone or at least primarily liable for the debt. Now, suppose Mr. *Webster* obtained a judgment or a decree against the *British Provident Company*, what would be his course? If the property of that company was deficient, he would then take proceedings against Dr. *Hardinge* as a shareholder, not of the *Anglo-Australian*, but of the *British Provident Company*; and in such case, as Dr. *Hardinge* would be a shareholder and Mr. *Webster* only a creditor of that company, the Court of Law would probably order Dr. *Hardinge* to pay the whole debt.

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I quite recognize the justice of the proposition, that inasmuch as Mr. *Webster* is a shareholder in the *Anglo-Australian Company* with Dr. *Hardinge*, each is liable to contribute to all the debts according to his shares. But what I am now asked to do is merely to withdraw the consideration and decision of the case from a Court of law, upon the suggestion that there is some equitable ground, and I do not think that any such equitable ground exists.

It appears to me, therefore, that there is no ground for the application now before me; and the motion must be refused with costs.

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February 8.

*Practice.**Injunction.**Leave to bring
Action at Law.**Affidavit in
support.*

WHITTON v. JENNINGS.

THIS was a motion for an injunction or for leave to bring an action at law.

Where a defendant to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel, and that the Plaintiff's patent was invalid; the Court, on a motion by the Plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction, or to give leave to bring an action, unless he produced a clear and distinct affidavit that the invention was novel and the patent valid; but allowed the motion to stand over for that purpose.

The Plaintiff filed his bill seeking to restrain the Defendant from infringing a patent. The Defendant by his answer filed on the 3rd of November, 1859, stated that the patent alleged to have been obtained by the Plaintiff was invalid on account of the invention to protect which it had been granted not being novel, that the invention belonged to the Defendant, and that the Plaintiff had obtained his knowledge of the invention from one of the Defendant's servants.

The Plaintiff now moved for an injunction or for leave to bring an action at law, but did not produce any affidavit as to his belief in the novelty of the invention.

Mr. *W. W. Cooper*, in support of the motion, cited *Bacon v. Jones (a)*; *Rodgers v. Nowill (b)*.

Mr. *Glasse* and Mr. *Southgate* opposed the motion, and submitted that the Court would not retain a bill merely to allow the Plaintiff to proceed at law, and that the Plaintiff must either dismiss his bill or proceed to a hearing. The Plaintiff had not filed any affidavit as to the validity of the patent or novelty of the invention; *Hill v. Thompson (c)*.

(a) 4 My. & Cr. 433.
(b) 6 Hare, 332.

(c) 3 Mer. 622.

Mr. W. W. Cooper, in reply.

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The course of the Court in cases like the present is merely to enable the Plaintiff to obtain the advantages of his legal right. But the Court will not try that legal right, and therefore when a bill is filed, as in this case, seeking to restrain an alleged infringement of a patent, and the Plaintiff moves for an injunction or for leave to bring an action at law, the Court will give him leave to bring an action at law, and allows the whole case to stand over. But if the Defendant has by his answer set up as his defence that the patent is invalid on account of its not being novel, and that the Plaintiff has derived his information from the Defendant's servant, it appears to me that the Plaintiff, applying for an injunction or for leave to bring an action, is bound to pledge his oath with respect to the novelty of the invention and the validity of the patent.

In the present case the Defendant filed his answer on the 3rd of November, and the Plaintiff, after waiting three months, now applies for an injunction without any affidavit, but with a mere statement that he has obtained a patent. I cannot grant an injunction, neither can I grant leave to bring an action unless the Plaintiff files an affidavit as to the novelty of the invention and as to the validity of the patent; that affidavit must be very clear and distinct on the subject, and the motion must stand over for that purpose (a).

(a) The practice on the point decided in this case was previously unsettled. The expressions used by Lord Cot-

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tenham, in *Bacon v. Jones* (4 My. & Cr. 433), seemed rather to favor the conclusion that it is of right in a patentee, who has filed a bill, to have leave to bring an action, whether he moves for an injunction or not; and consistent with that view seems also *Rogers v. Nowill*. It is to be collected also from the authorities that the rule is, that even where an injunction is refused, whether for want of evidence or on any other ground, the Court always gives leave to the Plaintiff to bring an action. However, since *Whitton v. Jennings*, the same point again came before Vice-Chancellor Wood, in a case of *Mayer v. Spence* (not yet reported). In *Mayer v. Spence* (in which *Whitton v. Jennings* was not cited), no motion for an injunction was made; and on a motion merely for leave to bring an action, the Court required the Plaintiff to verify his title, as he would do on a motion for an injunction. The practice may, therefore, now be considered as so settled; and it seems that such a motion ought to be on notice.—
REPORTERS.

In re THE ANGLO-AUSTRALIAN AND UNIVERSAL FAMILY LIFE ASSURANCE COMPANY, *Ex parte* SMITH.

In re THE BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY, *Ex parte* COLLINS.

In re THE WINDING-UP ACTS, 1848 and 1849.

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January 18, 19,
20.

Winding Up.
Joint Stock
Companies.
Amalgamation.

THESE two petitions were heard together.

The first petition was presented for the winding up of the *Anglo-Australian Company*, of which Mr. *Smith* was a shareholder; and the second petition prayed the company under a deed of amalgamation, by which it was provided, that the shareholders in the old company should exchange their shares for shares in the new company, and that the new company should indemnify the old company in respect of all its debts and liabilities. Some only of the shareholders in the old company executed the deed of amalgamation and became shareholders in the new company. The new company disputed their liability to carry out the arrangement for the amalgamation, and did not pay the debts of the old company, and actions were brought against the old company. The new company subsequently assigned their business, but not their assets, to another company.

Upon a petition for the winding up of the old company, presented by a shareholder in the new company, who had originally been a shareholder in the old company, and which was supported by the shareholders of the old company who had executed the deed of amalgamation, but opposed by those who had not, the Court refused to order the old company to be wound up, and dismissed the petition, with costs as against those shareholders who had been served, but without costs as against those shareholders who had voluntarily appeared.

A shareholder in the new company gave notice to a third company, to whom the new company had assigned its business, not to pay certain monies due from them to the new company, in consequence of which litigation ensued. The shareholder then presented his petition to wind up the new company.

Held, that the existence of suits against the company was not *per se* proof of its insolvency, and the petition was ordered to stand over, with liberty to apply.

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winding up of the *British Provident Society*, of which Mr. *Collins* was a shareholder.

The petition of Mr. *Smith* in respect of the *Anglo-Australian Company* was founded on the circumstance that the company had ceased to carry on its business, or only carried it on for the purpose of winding up its affairs; that it had transferred its property and assets to the *British Provident Society* under an agreement for an amalgamation; and that several suits had been instituted against it for debts which it had not paid, but in respect of which the *British Provident Society* ought to have indemnified it.

The petition presented by Mr. *Collins* for the winding up of the *British Provident Society* proceeded on the circumstance that the society was embarrassed and insolvent, and had ceased to carry on its business.

It appeared that the *Anglo-Australian Company* was completely registered and incorporated under a deed of settlement in 1853, and that the *British Provident Society* was completely registered and incorporated under a deed of settlement in 1850.

By an indenture entered into between the *British Provident Society* and the *Anglo-Australian Company*, dated the 1st of June, 1858, and executed by two directors on behalf of each company, after reciting that under the powers of amalgamation contained in the deeds of settlement of the respective companies it had been agreed by the respective boards of directors in April, 1858, that, subject to the confirmation of general meetings of the two companies, they should be amalgamated as from the 19th of April, 1858, and that extra-

ordinary meetings of the two companies had been held under the deeds of settlement, at which the amalgamation had been confirmed, it was thereby covenanted and agreed on behalf of the two companies, in consideration of the stipulations therein contained, that from the 19th of April, 1858, the *Anglo-Australian Company* and their business connections, agencies and branches should be transferred to and amalgamated with the *British Provident Society* on the terms contained in the said indenture. The indenture contained the following provisions:—That the business, property, effects, liabilities and engagements of the *Anglo-Australian Company*, with the risks of life assurances, should be transferred to the *British Provident Society*. That the respective shareholders, as to payment on their shares, should be put on an equal footing and make up their calls. That the shareholders of the *Anglo-Australian Company* should execute the deed of settlement of the *British Provident Society*, putting them thereby in the same position in the *British Provident Society* as they had previously occupied in the *Anglo-Australian Company*, and indemnifying them out of the monies of the *British Provident Society* against all liabilities under the deed of settlement of the *Anglo-Australian Company*; and it was provided that such shareholders should execute the deed of settlement of the *British Provident Society* before the 24th of June then next, or be excluded from the benefit of the amalgamation, but should not be freed from their liabilities as shareholders of the *Anglo-Australian Company*. That the name, registration and constitution of the *Anglo-Australian Company* should be maintained until otherwise determined by a general meeting of the *British Provident Society*. That on the execution of that indenture all the assets, property

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and effects of the *Anglo-Australian Company* should be assigned to trustees for the *British Provident Society*.

In conformity with the provisions of the last-mentioned indenture a large number of the shareholders in the *Anglo-Australian Company* executed the deed of settlement of the *British Provident Society*, but a certain class did not do so, and were therefore excluded from the benefit of the amalgamation.

The *British Provident Society*, after the execution of this indenture, took possession of the whole of the monies, property and effects of the *Anglo-Australian Company*, and received premiums in respect of the policies; and on the 28th of October, 1858, a transfer in pursuance of the indenture of the 1st of June, 1858, was executed to the *British Provident Society*.

The petition of Mr. *Smith*, after stating the above facts, stated that the Petitioner at the time of the amalgamation was a shareholder in the *Anglo-Australian Company*, and that he surrendered his shares in that company to the *British Provident Society*, and took scrip in the *British Provident Society* in exchange, and that he signed the deed of settlement of the *British Provident Society*; and the Petitioner contended that notwithstanding the surrender so made by him of his shares in the *Anglo-Australian Company*, he was still a contributory of that company and liable to their debts. That, although the *British Provident Society* had taken possession of the whole of the property of the *Anglo-Australian Company*, they had not paid the debts and liabilities of that company, which under the deed of June, 1858, they were bound to do. That several suits had been instituted against the *Anglo-Australian Com-*

*pany* since June, 1858, for debts which ought to have been paid by the *British Provident Society*, and in respect of which the *British Provident Society* ought to have indemnified the *Anglo-Australian Company*. That the *British Provident Society* was in embarrassed circumstances and had disposed of the property of the *Anglo-Australian Company* for their own purposes. That it had been agreed by an indenture dated in March, 1859, to transfer to the *British Nation Life Assurance Association* the business, name and title of the *British Provident Society*, subject to the confirmation of general meetings of the *British Nation Life Assurance Association* and *British Provident Society*, such transfer to take effect from the 31st of March, when the *British Provident Society* should cease to carry on business, and be only answerable up to that date; and that the name of the society should become the property of the *British Nation Life Assurance Association*. That, by way of consideration for the transfer, a sum, equivalent to a moiety of the income received by the *British Nation Life Assurance Association* during two years from March, 1859, out of the premiums, was to be paid by four half-yearly instalments. That the agreement for transfer of the 8th of March, 1859, had been confirmed. That the *Anglo-Australian Company* had wholly ceased to carry on business, or only carried it on for winding up their affairs; and that the Petitioner was advised that he still continued to be a shareholder in the *Anglo-Australian Company*, and as such liable for the debts and liabilities of that company; and the Petitioner prayed that the *Anglo-Australian Company* might be ordered to be wound up.

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The other petition, which was presented by Mr. Collins for the winding up of the *British Provident Society*,

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after stating to the effect above set out, stated that the *British Provident Society* was embarrassed and insolvent, and had ceased to carry on business; that the Petitioner was a shareholder in the *British Provident Society*, and as such liable to contribute to its debts and liabilities; and on these grounds the Petitioner prayed that the *British Provident Society* might be wound up.

Mr. *Baily* and Mr. *W. W. Barry* in support of both petitions.

It is clear that as to each company the circumstances are such as to bring the case within the provisions of the Winding-Up Acts, and the only question, therefore, for the Court to determine is, whether it is expedient that these companies should be wound up. The *Anglo-Australian Company* is clearly insolvent and unable to meet its liabilities, and has transferred all its assets. Mr. *Smith*, it is true, is now a shareholder of the *British Provident Society*, and as one of that body is liable to indemnify the shareholders in the *Anglo-Australian Company*, but there is a class of shareholders who have not executed the deed of settlement of the *British Provident Society*, who have repudiated the agreement of amalgamation, and who, under the express terms of that agreement, are excluded from all benefit thereunder, and who are therefore liable to contribute to the debts of the *Anglo-Australian Company*.

With reference to the *British Provident Society*, it is contended that there are sufficient assets to meet their own liabilities, and that those of the *Anglo-Australian Company* ought not to be taken into account, as the society has repudiated the agreement for amalgamation on the ground of fraud. The *British Provident Society*

has received all the assets of the *Anglo-Australian Company*, is suing in their name, has actually the common seal of such company in its possession, and yet now, when the bargain has proved a bad one, the *British Provident Society* seeks to repudiate the agreement. There is no chance of this agreement being set aside, and therefore the *British Provident Society* is clearly insolvent,

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Numerous actions have been brought and are now pending, and suits have been instituted against both companies, and there is a large class of poor shareholders to whom the delays and expenses incident to these proceedings will prove their ruin. It would be difficult to suppose a case that comes more within the spirit of the Winding-Up Acts.

Mr. Cole, Mr. W. G. Harrison and Mr. T. Stevens, for shareholders in the *British Provident Society* who had originally been shareholders in the *Anglo-Australian Company*, supported the first petition.

Mr. Jolliffe for General Horn, a shareholder and director in the *Anglo-Australian Company* who had not signed the deed of the *British Provident Society*, supported the first petition, on condition that the *British Provident Society* should be wound up first; but the VICE-CHANCELLOR considered that, as he stood in the position of a creditor, he could not be heard.

Mr. Glasse and Mr. Shebbeare on behalf of Messrs. Webster, Ridge and Pepper, who were parties interested in the affairs of the two companies as directors and shareholders, opposed the first petition and supported the second petition.

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Mr. *Roxburgh* and Mr. *W. G. Harrison*, for the *British Provident Society*, opposed the petition for the winding up of that society, on the ground that that society was well able to meet all its liabilities, exclusive of those incurred in respect of the *Anglo-Australian Company*, and that with reference to the latter, as the same were being disputed, and it was not certain that the arrangement would be carried out, they ought not to be taken into account.

Mr. *Baily* in reply on both petitions.

The following cases were referred to:—*Ex parte Walker*(a); *Ex parte Phillips*(b); *Ex parte Dee*(c); *Re Sherwood Loan Company, Ex parte Smith*(d); *Ex parte Wise*(e); *Ex parte Murrell*(f); *Re British Alkali Company*(g); *Re Monmouth and Glamorganshire Banking Company*(h); *Re Birche, Torr and Vitifer Company, Ex parte Lawton*(i); *Re Wheal Lovell Mining Company, Wild's Case*(j); *Ex parte the Official Manager of the Port of London Shipowners' Loan and Assurance Company*(k).

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Inasmuch as the two companies, for the winding up of which these petitions were presented, have formed a certain connexion, or attempted to do so, I thought it desirable to hear them together, but for the purposes of my decision I must consider them separately.

(a) 1 De G. & Sm. 585.

(b) 3 De G. & Sm. 3.

(c) *Ibid.* 112.

(d) 1 Sim. N. S. 165.

(e) 1 Drew. 465.

(f) 3 De G. & Sm. 4.

(g) 5 De G. & Sm. 458.

(h) 15 Beav. 74.

(i) 1 K. & J. 204.

(j) 1 M. & G. 1.

(k) 24 L. J., Ch. 705.

First, with regard to the petition for the winding up of the *Anglo-Australian Company*.

Many suggestions have been made why it is expedient to wind up this company. It is said that this company comes within the scope of the authority given by the Act of Parliament, as it has ceased to carry on its business, is unable to pay its liabilities, and has transferred its assets to another company. The conclusion, however, to which the arguments for the petition tend, appears to me to be rather that the Respondents do not show sufficient grounds why the company should not be wound up, than that the Petitioner has shown, as the onus lies on him to do, why the company should be wound up.

Let me assume that this company comes precisely within the scope of the jurisdiction given by the Act of Parliament; that it is a company insolvent, unable to pay its debts. Let me assume further that it is a case in which calls may be required for the purpose of paying debts, and that although the *British Provident Society* should desire to perform its obligations, it should be unable to do so, and that therefore some debts and liabilities will fall on the shareholders of the *Anglo-Australian Company*, and that the Petitioner is a contributory in the *Anglo-Australian Company*, though he has joined the *British Provident Society* under the amalgamation: all these matters being assumed in favor of the Petitioner, what does his petition amount to?

The Petitioner, having been a shareholder in the *Anglo-Australian Company*, has adopted the arrangement with the *British Provident Society*, and changed his shares in the former company for shares in the

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British Provident Society. Those who appear and support his petition are all persons in the same position, that is, they were shareholders in the *Anglo-Australian Company*, and are now shareholders in the *British Provident Society*. It is a part of the Petitioner's contention, and of those who support his petition, that the arrangement with the *British Provident Society* ought to be carried out; that if a bill were filed to enforce it, any attempt to resist it would fail, and the result would be a decree for specific performance. The persons opposing the petition are shareholders remaining in the *Anglo-Australian Company* who have not become shareholders in the *British Provident Society*. Of those who have not become shareholders in the *British Provident Society*, General Horn is the only one who does not absolutely oppose the petition, and he only supports it on one condition, viz., that the *British Provident Society* shall also be wound up. So that the case resolves itself into this: those who joined in the amalgamation and insist that it ought to be carried into effect (the result of which would be that the shareholders in the *British Provident Society* (themselves being of that number) would have to pay all the debts of the *Anglo-Australian Company* in exoneration of the shareholders of that company), now come and ask that the *Anglo-Australian Company* shall be wound up—in other words, that the shareholders in the last-mentioned company shall contribute with them to pay the debts in respect of which they have agreed to exonerate the *Anglo-Australian Company's* shareholders.

Assuming therefore everything in favor of the Petitioner, this petition must be dismissed—with costs as to those who were served with it, but without costs as to volunteers.

The other petition is presented by a shareholder in the *British Provident Society*, seeking to wind up that company. The petition represents that the *British Provident Society* took the assets and liabilities of the *Anglo-Australian Company*, but that the former society is disputing the liability to perform that contract. The *British Provident Society* found it expedient to make a somewhat similar arrangement with the *British Nation Life Assurance Association*, and accordingly transferred all their business, though not all their assets, to that association; and, except for a short period during which they were to have the benefit of some arrangements as to profits, had ceased to carry on business.

I will assume that this company is in a position which brings it within the jurisdiction of the Court under the Winding-Up Acts. It appears that the *British Nation Association* has agreed to pay to the *British Provident Society* a considerable sum of money; but it is suggested that the *British Provident Society* is insolvent. If that society is bound to carry out the arrangement with the *Anglo-Australian Company*, it may not be able to meet its liabilities; but that is not satisfactorily established to my mind. It is stated on the petition that several actions and suits against the society have been compromised by the giving of bills or promissory notes, and it is contended that this is an indication that the society is unable to meet its liabilities. It may be that if the arrangement with the *British Nation Association* is carried out, there will be sufficient assets to meet the liabilities of the *British Provident Society*. The Petitioner has endeavoured to intercept those assets by giving notice to the *British Nation Association* not to make any payments to the *British Provident Society* under their contract. It is not suggested that the

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*British Nation Association* is not capable and willing to carry out its arrangement with the *British Provident Society*.

Under these circumstances I do not see any sufficient ground on which I can come to the conclusion that the *British Provident Society* is in such a position that it will not be able to meet its liabilities, so as to justify me in now making an order to wind it up. And although I find that suits have been brought against the society, it does not appear to me that they have been staved off by giving bills or promissory notes. I must therefore either postpone this petition, and order it to stand over with a view to an arrangement, or take the other course, and refer it to Chambers to inquire whether it is fit and proper that there should be a winding-up order.

[By arrangement between the parties the Court ordered the petition to stand over, with liberty to any party to apply.]

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1860.  
January 26.

*Assignment by  
Letter.*

LAMBE v. ORTON.

THIS was a summons to vary the certificate of the Chief Clerk. The question was, whether a letter written by *William Orton*, who was entitled to a share in the estate of *Henry Orton*, and addressed to the executors of *Henry Orton*, amounted to an assignment of *William Orton's* present and future interest in *Henry Orton's* estate.

The suit was instituted for the administration of the estate of *Henry Orton*, who died in January, 1831.

*William Orton*, who, as the heir at law of the testator, was entitled to the real estate, as to which the testator died intestate, and to a one-fortieth share of the residuary personal estate as one of the next of kin, addressed to *James Orton*, the executor of *Henry Orton*, the following letter:—

Dear Uncle,—I wish you would be so good to pay to my cousin *John Cope* one-third or portion of the personal property which I am entitled to from my late uncle *Henry Orton's* effects, will oblige. I am, my dear uncle, your affectionate nephew, *William Orton*. Witness, *John Richdale*. *Litchurch*, May 27th, 1831.

“You will please to pay the remainder, two-thirds, of the personal effects due to me from my late uncle *Henry Orton*, to my uncle *George* and yourself.

“*Mr. James Orton, Uttoxeter.*”

*William Orton* died in 1831.

Where a *cestui que trust* by letter directed an executor to pay the share to which “I am entitled,” or “due to me,” to three persons equally, and such letter was adopted and acted on by all parties, the writer having died:

Held, that it is not necessary that an assignment to be valid in equity should be by deed, and therefore that such letter operated as an assignment of the whole share of the *cestui que trust* in the testator's estate, whether immediately payable or in reversion.

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This letter was acted upon by the executor, who paid 100*l.* to *John Cope* in respect of the one-third of the share of *William Orton* in the testator's residuary personal estate.

The testator had by his will left an annuity of 300*l.* to *Mary Redfane*, and *James Orton*, the executor, had set apart a fund to answer the annuity, and had divided the remainder of the personal estate. *Mary Redfane* died in 1869, and the question was, whether *William Orton's* share in the fund, which had been so set apart to answer the annuity and which was now to be divided, was to be appropriated in accordance with the letter of the 27th of May, 1831.

The Chief Clerk had certified that the letter operated as an assignment of *William Orton's* whole share in the residuary personal estate, and the present summons was taken out by the personal representatives of *William Orton* to vary that certificate.

Mr. *Baily* and Mr. *E. Webster* in support of the summons.

Mr. *Glasse* and Mr. *H. Bagshawe* for the Plaintiffs.

Mr. *Bagshawe*, Mr. *Bazalgette*, Mr. *Karslake*, Mr. *Cracknall* and Mr. *Colt*, for other parties.

Mr. *Baily* in reply.

The following cases were cited:—*Sewell v. Moxsy* (a); *Kekewich v. Manning* (b); *Lett v. Morris* (c); *M'Fad-*

(a) 2 Sim. N. S. 189.

(b) 1 De G., M. & G. 176.

(c) 4 Sim. 607.

*den v. Jenkyns* (a); *Paterson v. Murphy* (b); *Donaldson v. Donaldson* (c).

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The VICE-CHANCELLOR.

The first question is as to the construction of the letter, whether the intention of the writer was to extend the voluntary gift beyond the portion of the property which would be immediately payable. The testator *Henry Orton* died in January, 1831, and the letter was written in the May following; and though the amount of the share to which *William Orton* would be entitled was not then known, the words of the letter applied as much to the fund set apart as to that which was immediately payable, and were sufficient to embrace *William Orton's* share in that fund.

The letter is written by a *cestui que trust* to his trustee, directing and requesting him to pay the whole share to three specified persons. *William Orton* died without revoking the letter. *James Orton*, the executor, acted upon it. And the question is, whether the executor has acted rightly in carrying into effect that direction.

The cases on the subject are very numerous, and of a conflicting nature, there having been a fluctuation of the views entertained by the Court on the principles applicable to such cases. The tendency of the Courts formerly was, to hold such a direction insufficient; but the later decisions have been the other way. If a person, though without valuable consideration, gives a direction that property, to which he is entitled, should be given

(a) 1 Hare, 458; S. C., 1 Ph. 153.

(b) 11 Hare, 88.  
 (c) Kay, 711.

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to another, and that is communicated to and adopted and acted on by all parties, it seems only natural justice that such a direction should not, without good cause, be departed from.

I think that this case comes within the scope of the recent cases which have decided, that a person is entitled in this Court to the benefit of the voluntary gift. The case of *Donaldson v. Donaldson (a)*, differs from this case, that being a simple case of voluntary assignment being supported, acceptance not forming an ingredient. The case of *Bridge v. Bridge (b)*, decided by a very learned and able Judge (Sir John Romilly, M. R.), has established, that a mere assignment in writing, though not by deed, is sufficient.

The question is, whether this letter amounts to an assignment. If a person entitled to property does an act expressive of his intention that another person shall have it, and directing that it shall be paid to that person, I think that this amounts to an assignment.

Having regard to the cases, I must hold that the letter operated as an assignment, and that the parties named in it are entitled, not only to the share then immediately payable, but to all the present and future share of *William Orton* in the testator's personal estate.

(a) Kay, 711.

(b) 16 Beav. 316.

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1860.  
January 27.

*Statute of  
Limitations.  
Solicitor and  
Client.  
Acknowledg-  
ment.*

*In re* HINDMARSH.

IN 1849, *J. J. Hindmarsh* and *W. Evans* were employed as solicitors in the settlement of the affairs of *John Addinell*, who had become insolvent; and in the course of such settlement the Petitioner *William Addinell* became security for and arranged for the payment of a dividend to the creditors of *John Addinell* in consideration of having the real and personal estate of *John Addinell* assigned to him.

Messrs. *Hindmarsh* and *Evans* having been employed to sell and convert into money the real and personal estate of *John Addinell*, sold the same, and received the proceeds of such sale.

From time to time, down to the year 1850, Messrs. *Hindmarsh* and *Evans* delivered to the Petitioner bills of costs and cash accounts relating to the settlement of the affairs of *John Addinell*, and the last of the cash accounts, which extended down to October, 1851, showed a balance of 1,230*l.* 2*d.* due from them, of which sum Messrs. *Hindmarsh* and *Evans* subsequently paid 1,000*l.* to the Petitioner.

In the year 1853 the partnership between Messrs. *Hindmarsh* and *Evans* was dissolved, and in September, 1859, *James Hindmarsh* became insolvent.

The petition stated that, although other professional business was transacted and other monies were received

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor.

An acknowledgment of a debt contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter and others, or "obtaining a release of my liabilities in respect of such debts:" Held, not to amount to a promise to pay the debts, and therefore not to take the debts out of the Statute of Limitations.

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by Messrs. *Hindmarsh* and *Evans* in respect of the settlement of the affairs of *John Addinell*, Messrs. *Hindmarsh* and *Evans*, in breach of duty, neglected to send in the bill of costs or to account for monies received by them. That, until the Petitioner received the usual creditors' notice under the insolvency of *James Hindmarsh* he did not know that the partnership between Messrs. *Hindmarsh* and *Evans* had been dissolved.

That the affairs of *John Addinell* had some time since been arranged.

Upon the dissolution of the partnership it was arranged between them that each partner should retain his own clients, and it appeared that the Petitioner and *John Addinell* were originally clients of Mr. *Hindmarsh*.

In a letter written to *Hindmarsh* in July, 1856, *W. Evans* undertook to assign the debts and liabilities of the partnership to *Hindmarsh* upon *Hindmarsh* satisfying debts due to some other persons and Mr. *Addinell*, or "obtaining the release of my liability in respect of such debts."

The present petition prayed an account as against *W. Evans* in respect of a sum of 230*l.*, admitted on the balance of accounts in 1850 to be due to the Petitioner.

Mr. *Glasse* and Mr. *Humphry*, in support of the petition, submitted that the relation of trustee and *cestui que trust* existed between a solicitor and his client, and therefore the Statute of Limitations did not apply;

and that, even if the Statute would otherwise have applied, the recognition of the debt contained in the letter of July, 1856, prevented the operation of the Statute; *Craig v. Watson* (a); *Blair v. Bromley* (b); *Smith v. Pocock* (c).

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Mr. *Baily* and Mr. *Fischer*, for Mr. *Evans*, contended that *Addinell* was originally the client of *Hindmarsh*, and not of Mr. *Evans*, that it had been agreed, when the partnership was dissolved, that each partner should retain his own clients, and that the Petitioner had so dealt with the parties as to discharge *Evans* from his liability. Moreover, the debt sought to be recovered by the petition was barred by the Statute of Limitations. The recognition of the debt contained in the letter of July, 1856, did not amount to a promise to pay it, and therefore did not prevent the statute applying; *Smith v. Fox* (d); *Lyth v. Ault* (e); *Tanner v. Smart* (f); *Thompson v. Percival* (g); *Prance v. Sympson* (h); *Collyer on Partnership* (i).

Mr. *Glasne* in reply.

The VICE-CHANCELLOR (after saying that he did not think that the Petitioner had dealt with the parties in such a way as to discharge *Evans* from his liability, proceeded :)—

The next question is, whether the Statute of Limita-

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|------------------------------------|------------------------|
| (a) 8 Beav. 427.                   | (e) 7 Exch. 669.       |
| (b) 5 Hare, 542; S. C., 2 Ph. 354. | (f) 6 Barn. & Cr. 602. |
| (c) 2 Drew. 197.                   | (g) 5 B. & Adol. 925.  |
| (d) 6 Hare, 388.                   | (h) Kay, 678.          |
|                                    | (i) 2nd edit., p. 383. |



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*In re*

HINDMARSH.

tions applies as between a solicitor and his client? I can see no reason why it should not.

It is insisted that a solicitor generally stands, in a certain sense, in a fiduciary character towards his client, so that there is a sort of relation of trustee and *cestui que trust* between them, and that, as between a trustee and *cestui que trust*, the statute does not apply; and it is contended that for that reason it does not apply in this case. But I do not think that any such character of trustee and *cestui que trust* existed in this case as will exclude the application of the statute. It appears that *Addinell* became the client of *Hindmarsh* and *Evans*, and that these monies were received by them in winding up the estate of *John Addinell* in the ordinary character of agents, and whether they were the solicitors of the Petitioner or not does not affect the question, and does not constitute the relation of trustee and *cestui que trust*, or place the parties in any other position than that of ordinary principal and agents. If, indeed, solicitors have fraudulently got into their hands monies belonging to clients, that may give rise to a different state of circumstances; but in this case there is no question but that Messrs. *Hindmarsh* and *Evans* received the monies in the ordinary character of agents. *Addinell*, indeed, knew they would be entitled to a set-off in respect of their costs; but it appears to me that there is no reason on that account why the statute should not apply to the case of a solicitor receiving monies on account of his client. The language of the statute is distinctly applicable to a case of account, and there is no exception in the statute as regards solicitors, but only as regards merchants.

It appears to me, therefore, that the Statute of Limi-

tations does apply to an action or suit brought by a client against the solicitor for monies received by the solicitor as agent, or to a petition presented under the act.

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*In re*  
 HINDMARSH.

The next question is, whether there has been such an admission of the debt as to prevent the statute applying, that is, whether the letter of the 10th of July, 1856, is such an acknowledgment of the debt as is required by Lord *Tenterden's* Act.

The effect of that letter is, that whereas *Hindmarsh* ought, according to the arrangement on the dissolution, to have paid certain debts and liabilities, some of which *Evans* had himself paid or undertaken to pay, *Hindmarsh* was to give to *Evans* a certain bill of exchange. That letter did not touch the question of debt as between the debtor and creditor, but it expressed the obligation of *Hindmarsh* to pay instead of *Evans*, and as between them was a recognition of the existence of a debt from the firm to *Addinall*.

But that is not such an acknowledgment as amounts to a promise to pay. At one period it was held that a mere mention of a debt amounted to a promise to pay, but that view has long since been altered, and it has been held that a recognition of a debt is not sufficient, but that it must amount to a promise to pay. It has been said that this is not a question of a particular debt, but as to a right to an account. But this letter does not amount to an undertaking to account.

The effect of the decisions at law appear to me to be that a mere recognition of debt is not sufficient to take the case out of the statute, but there must be such a

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*In re*

HINDMARSH.

recognition of the liability as amounts to a promise or undertaking to pay the debt.

I think, therefore, that the debt in this case is not taken out of the statute.

The petition must therefore be dismissed, but without costs.

March 19.

*Costs.*

*Legatee's Suit.  
Deficient Estate.*

THOMAS v. JONES.

Where a legatee files a bill for the administration of a testator's estate, whether it is expressed that he does so on behalf of himself and the other legatees or not, he does in fact represent them, and when all the debts are paid, the fund belongs to the legatees, and the Plaintiff is entitled to his costs of suit, as between solicitor and client, the fund not being sufficient to pay all the legacies in full.

THIS suit was instituted by a legatee for the administration of the testator's estate, and the question was, whether the Plaintiff was entitled to costs as between solicitor and client, or merely as between party and party, the estate proving insufficient to pay all the legacies in full.

The suit was originally instituted by the executrix, who was tenant for life of the real and personal estate of the testator *John Thomas*, for the administration of the testator's estate. The testator by his will had charged considerable pecuniary legacies on his real estate, payable after the death of the tenant for life.

The Plaintiff in the original suit died after decrees, but pending the suit, which was revived by the present Plaintiff, one of the pecuniary legatees, to obtain a sale of the testator's real estate and the payment of legacies.

By an order made on the revived suit coming on to be heard, and on further consideration of the original suits, the testator's real estate was ordered to be sold; and it was ordered that the costs of all parties to the first suit should be taxed and paid as between solicitor and client, and that the costs of the Plaintiff in the revived suit should be taxed and paid as between party and party.

The testator's real estates were accordingly sold and the costs taxed, and the Chief Clerk by his certificate found that the debts had been paid, but that the fund was not sufficient to pay all the legacies.

The original and revived suits now came on upon further consideration.

Mr. *Baily* and Mr. *Cracknall*, for the Plaintiff, applied for her costs, and submitted that all the debts having been paid the fund belonged to the legatees, of whom the Plaintiff was one, and that the Plaintiff having recovered the fund in the suit she was entitled to her costs as between solicitor and client.

Mr. *Glasse* and Mr. *C. M. Roupell*, who appeared for the Defendants the trustees, contended that the Plaintiff was entitled only to her costs as between party and party, and had no right to extra costs out of the fund which belonged to the legatees.

The following cases were referred to:—*Cross v. Kennington* (a); *Burkitt v. Ransom* (b); *Waldron v. Frances* (c); *Goldsmith v. Russell* (d); *Stanton v. Hatfield* (e); *Weston v. Clowes* (f).

(a) 11 Beav. 89.

(b) 2 Coll. C. C. 536.

(c) 10 Hare, x, App.

(d) 5 De G., M. & G. 556.

(e) 1 Keen, 358.

(f) 15 Sim. 610.

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## The VICE-CHANCELLOR.

Although no fixed rule has been followed, in all the cases the tendency of the decisions appears to have been in favor of the principle upon which the case of *Cross v. Kennington* (a), before the Master of the Rolls, was decided.

If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and therefore if a creditor has for the benefit of all the other creditors instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro rata* should be applied in the payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only. If the fund is sufficient to pay all the creditors, and there is a surplus, that surplus does not belong to the creditors, but to the residuary and general legatees.

Suppose, as in some of the cases cited, the bill had been filed by one of the residuary legatees, all the other residuary legatees must under the old practice have been made parties; and although under the new practice they are not all necessarily made parties originally, yet it is necessary that they should be brought before the Court under the decree. In such a case as that there is no more reason why the residuary legatee filing the bill should have his costs as between solicitor and client

(a) 11 Beav. 89.

than the other residuary legatees who are made parties originally, or brought before the Court under the decree; the principle is not applicable to such a case as that. In the same way, if in any ordinary legatee's suit the fund is not sufficient to pay creditors, the legatee who files the bill has no right to costs as between solicitor and client, as the fund does not belong to the legatees, but to the creditors; and he has no right to be allowed *extra* costs out of a fund belonging to another class of persons.

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But where a legatee files a bill, and the fund, though sufficient to pay the creditors, will only suffice to pay a portion of the legacies, what remains after satisfying the creditors belongs exclusively to the legatees. The legatee filing the bill, whether it is expressed or not that he files it on behalf of himself and the other legatees, is considered as representing them all. And as he has for the benefit of all the legatees recovered the fund which belongs exclusively to the legatees, I think the same principle as to costs applies as in the case of a creditor's bill where the fund recovered is insufficient to pay all the debts.

Following, therefore, the principle upon which the case of *Cross v. Kennington* and the other cases have been decided, I think the Plaintiff is entitled to her costs as between solicitor and client. It has been suggested that the Plaintiff's costs were on the first hearing directed to be taxed as between party and party; but the reason why that was done was, that it was not then ascertained that the fund was deficient.

1860.  
March 26.

*Evidence.*  
*Answer.*  
*Motion for*  
*Decree.*

### STEPHENS v. HEATHCOTE.

Rules of practice as to a Defendant reading his own answer; or the answer of a co-Defendant on motion for a decree.

IN this case, which came on upon a motion for a decree, the Defendant desired to read his own answer; not having given notice that he should read it; he desired also to read the answer of a co-Defendant, not having given notice to read it.

Mr. *Bazalgette* objected on both points.

Mr. *Baily*, *contra*.

A motion for decree is different from a suit heard in the usual manner upon replication filed. The Act requires notice of reading affidavits, and the Plaintiff cannot read the Defendant's affidavits, any more than the Defendant can, unless the Defendant has given notice of reading them. But though the act makes the answer an affidavit for the purpose of cross-examination, it is not an affidavit for all purposes; once filed, it is evidence which the Plaintiff may read, whether notice has been given or not, and if it is evidence which he may read, it is evidence which, in its character of affidavit, the Defendant may read. It is not correct to say that the act strictly makes it an affidavit; it says that it shall be treated as an affidavit, that is, subject to cross-examination, which as answer it is not; but it is in strictness, admissions, which the Plaintiff may read without any notice given; and the act fixes upon those admissions the character of affidavit, so as to let in cross-examination; and then of course, it is evidence at once and without notice, for both parties.

**Mr. Bazalgette.** The intention of the act was, that each party should know what the other intends to use; the answer is not evidence without notice till the Plaintiff reads it. Suppose the Plaintiff does not intend to read it; how is he to know that he is to cross-examine upon it, unless the Defendant has told him he means to read it? When the act assimilates the answer to an affidavit, it subjects it to all the consequential directions of the act; among others to the necessity of notice being given.

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v.  
HEATHCOTE.

The second question was not argued, as the VICE-CHANCELLOR declined to decide the points without consulting the registrars. The following questions were accordingly transmitted to the registrars; and the answers of eleven of the registrars are appended:

On motion for decree,—

1. Can a Plaintiff read the answer of a Defendant against that Defendant without notice?—We are of opinion that he can. See *Cousins v. Vasey* (a).

2. Can a Defendant read his own answer against a Plaintiff without notice?—We are not aware of any decision. But see *Barrack v. McCulloch* (b).

3. If a Plaintiff read one passage of a Defendant's answer against the same Defendant; can that Defendant read the whole of his answer against the Plaintiff, not having given notice?—We are not aware of any decision.

4. Can a Plaintiff read the answer of one Defendant

(a) 9 Hare, App. lxi.

(b) 3 Kay & J. 110.



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 STEPHENS  
 v.  
 HEATHCOTE.

against another Defendant without having given notice?  
 —We are of opinion that he cannot. *Cousins v. Vasey* (a); *Tuck v. Lamprell* (b).

5. Can one Defendant read the answer of another Defendant against a Plaintiff, without having given notice?—We are of opinion that he cannot. *Vide Rushout v. Turner* (c).

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The VICE-CHANCELLOR, having received these answers, delivered the following judgment :—

I have no doubt that in the first place the Plaintiff can, upon motion for a decree, read the answer of a Defendant against that Defendant without giving him notice. I have also no doubt that he cannot read the answer of one Defendant against another Defendant, without giving him notice. Then comes the question, whether a Defendant can read his own answer against the Plaintiff without notice, and on that, reference was

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(a) 9 Hare, App. lxi. (b) 3 Weekly Rep. 193.

(c) Extract from Mr. *Leach's* Notes :—  
 Vice-Chancellor *Wood's* Court.—June 1, 1857.  
*Rushout v. Turner.*

Motion for a decree.

*Cairns*, for the Defendant *Turner*, proposes to read the answer of co-Defendant *Cheslyn Hall*.

Mr. *Chanders* objected.

*Cur.* Unless Mr *Cairns* can produce some authority on the point, the Vice-Chancellor was of opinion, that one Defendant could not read the answer of a co-Defendant against the Plaintiff, without giving notice to that effect.

made to *Barrack v. M' Culloch* (a). That case does not decide it; but rather seems to infer that it could not be read without notice, if it were a motion for a decree; therefore, it is for me to express my opinion on the question.

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 STEPHENS  
 v.  
 HEATHCOTE.

The whole object of these rules as to reading answers as affidavits is to prevent the parties from being taken by surprise, and every rule ought to be adapted to that end. Now, if the Plaintiff chooses to read the answer of a Defendant against him, without notice, there can be no surprise on him; but how is it when the Defendant proposes to read his answer against the Plaintiff? It very often happens, especially when the answer is voluntary, that the Plaintiff's solicitor goes to the office of Records and Writs, reads the answer, and, if there is nothing in it which he desires to use, does not take a copy; but if the Defendant were able to read it against the Plaintiff without notice, it would be necessary for the Plaintiff in every case to take a copy of every Defendant's answer. I think, therefore, that the rule ought to be, that a Defendant cannot read his own answer against the Plaintiff without giving him notice.

The only remaining question is, supposing the Plaintiff reads one passage of the answer against the Defendant, can the Defendant read the whole of the answer against the Plaintiff? Now in such a case there can be no surprise; and therefore, I think that if a Plaintiff reads part of an answer against a Defendant, the Defendant is entitled to read the whole answer against the Plaintiff.

(a) 3 Kay & J. 110.

1860.  
May 30.

*Settled Estates  
Act, 1856  
(19 & 20 Vict.  
c. 120).*

*21st Regulation  
of 8th of August,  
1857. Petition.*

The Regulations of the 8th of August, 1857, are not absolutely binding as orders.

Therefore, though those Regulations direct that a guardian to an infant Petitioner must be appointed before the petition is presented, the Court authorized such an appointment on an application after the petition had been presented and answered.

### *Re* LONGSTAFFE'S SETTLED ESTATES.

A PETITION had been presented under the Settled Estates Act, 1856 (a), seeking power for the trustees under the testator's will to sell a leasehold estate devised by the will, no such power being given by the will. The petition was answered on the 21st of April, 1860, and the usual advertisements directed by the Chief Clerk had been inserted in the *London Gazette*. Subsequently an application was made in Chambers, appointing the father of the infant Petitioner, who was himself also a Petitioner, the guardian of the infant for the purpose of the petition; but the Chief Clerk objected to draw up the order asked, on the ground that by the 21st Regulation of the 8th August, 1857, the application for the appointment should have been made previously to the presentation of the petition.

Mr. *Smale* now asked that, notwithstanding the Regulation, the appointment of the father as guardian might be now directed; *In re Hargrave's Trust* (b). Vice-Chancellor *Stuart* had said that these Regulations were merely rules for the convenience of practice and not obligatory, in the same way as Orders; and he submitted that it would be the more convenient practice that the petition should be judicially before the Court when such an order was made.

The VICE-CHANCELLOR said, he considered the Regulations were not absolutely binding in the same way

(a) 19 & 20 Vict. c. 120.


(b) 7 W. R. 156.

as Orders were, and he thought that the order might be made after the petition was presented. He therefore should direct the registrar to take a note of his opinion for the guidance of the Chief Clerk.

1860.  
  
*Re*  
**LONGSTAFF'S  
 SETTLED  
 ESTATES.**

May 1, 7, 22,  
 23, 24.

June 12.

  
*Mortgagor and  
 Mortgagee.  
 Sale by  
 Mortgagee.  
 Purchase by  
 Mortgagee.  
 Notice of Sale  
 to Mortgagor.*

PARKINSON v. HANBURY.

**THIS** was a redemption suit.

In 1823 *John Farrell Parkinson*, being possessed of the Royal Oak public-house for a term of years, conveyed the same with other property by way of mortgage to *Thomas Chambers* to secure 2,000*l.* The mortgage deed contained a power enabling the mortgagee to sell the same upon giving three months notice in writing to the mortgagor his executors or administrators, and contained the usual clause that the purchaser should not be required to see that previous notice of the sale had been

Where a first mortgagee under his power of sale sold the mortgaged premises by private contract to second mortgagees, who were mortgagees in possession

and also trustees for sale for the mortgagor, and the mortgage deed required that, before any sale should be made, three months notice should be given to the mortgagor, and contained a clause, that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees, at the time they purchased, knew that the three months' notice had not been given to the mortgagor, he having died some time before, and no administration having then been taken out to his estate.

Upon a suit for redemption by the mortgagor's administratrix, Held, that she was entitled to redeem, and that the clause, discharging a purchaser from ascertaining whether proper notice has been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given.

There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale.

1860.  
PARKINSON  
v.  
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given, nor inquire into the necessity or expediency of the sale, and that the receipt of *Chambers* should be a sufficient discharge to the purchaser. A receiver was appointed to receive the rents on behalf of the mortgagees.

In 1828, *John F. Parkinson*, being indebted to various persons, executed a conveyance to Mr. *Aveling* as representing the Defendants Messrs. *Hanbury*, upon trust to sell the Royal Oak public-house to secure 705*l*. By this deed it was provided that Messrs. *Hanbury*, out of the proceeds of the sale, should pay off the principal and interest of *Chambers'* mortgage. In May, 1828, *Parkinson* authorized Messrs. *Hanbury* to receive the rents &c. of the mortgaged premises, and make certain payments as his agents and on his account, and Messrs. *Hanbury* continued in receipt of the rents of the mortgaged premises until October, 1834.

On the 6th of October, 1831, Mr. *Parkinson* died in debt and intestate, and no administration was at that time taken out to his estate.

In October, 1834, *Thomas Chambers*, in exercise of his power of sale, but without giving the notice required by his deed (there being in fact no representative of *Parkinson* at that time), sold the Royal Oak by private contract to Messrs. *Hanbury & Co.* for 1,300*l*.

In February, 1845, the Plaintiff Miss *Parkinson* took out administration to her father's estate, and in 1848 filed a bill against the present Defendants for redemption, but subsequently herself dismissed that bill.

The Plaintiff, in 1852, filed the present bill for re-

demption of the Royal Oak public-house, and the bill also sought to make the Defendants account in respect of some other property included in their mortgage.

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The cause now came on to be heard.


A great deal of evidence was adduced with the view of showing that the sale of the Royal Oak to Messrs. *Hanbury* had been made greatly under its value.

Mr. *Greene* and Mr. *Bosanquet* for the Plaintiff.

The sale to the Defendants Messrs. *Hanbury* is invalid; it was made at an undervalue; Messrs. *Hanbury* were mortgagees in possession, and also trustees for sale for the Plaintiff, and it was their duty to make the most of the property. No notice of the sale was given to the mortgagor or his representative, though notice might have been given to the Plaintiff. The clause discharging a purchaser from ascertaining whether proper notice has been given does not protect a purchaser who has actual notice that such notice has not been given.

Mr. *Glasse* and Mr. *Pryor*, for the Defendants, submitted that the Plaintiff was not entitled to redeem the property which the Defendants had absolutely purchased from *Chambers* in 1834.

The deed under which the Defendants purchased contained a clause exonerating them from the duty of seeing that the three months' notice had been given, and therefore the sale to them could not be invalidated through want of that notice. The Statute of Limitations, moreover, was a bar to the Plaintiff's claim. The Defendants were, up to the time of the purchase, not mortgagees in possession, but were receiving the

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rents as agents for *Parkinson* or his estate, and liable to account for them as such. There was nothing in the Defendants' position which could render it improper for them to purchase from the first mortgagee.

Mr. *Greene* in reply.

The following cases were referred to:—*Featherstonhaugh v. Fenwick* (a); *Baldwin v. Banister* (b); *Nesbitt v. Tredennich* (c); *Orme v. Wright* (d).

#### THE VICE-CHANCELLOR.

Several grounds have been stated why the Plaintiffs should be allowed to redeem. It is alleged that the sale was made at an undervalue, but I do not think the evidence supports this contention. It has also been suggested that, as a general rule in equity, a second mortgagee cannot purchase of the first mortgagee who sells under a power of sale, but I know of no authority for such a rule.

Another ground upon which it is contended the Plaintiff is entitled to redeem is this, that Messrs. *Hanbury* stood in the position not only of second mortgagees, but they were trustees for *Parkinson*, and after his death for his representative, for sale of the premises, and as such it was their duty to make the most of the property, pay their own mortgage debt out of the proceeds, and hold the surplus for the benefit of *Parkinson* or his representatives; although, in October, 1834, when the sale took place, they were not actually in re-

(a) 17 Ves. 298.

(b) 3 P. Wms. 251, note.

(c) 1 B. & B. 46.

(d) 3 Jur. 19.

ceipt of the rents of the Royal Oak, they had been so up to a very recent period. At the time when the sale was made *Parkinson* was dead, and he had no personal representative, and the sale, instead of being by public auction, was by private contract.

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These circumstances, under which this sale was made, are such as to raise a very serious question—whether, in a Court of Equity, a purchase so made by persons standing in such a position can be allowed to stand?

But it is not necessary for me to decide the case on that ground, for there is another ground relied on by the Plaintiffs, which I think is conclusive against the validity of the purchase. By the power of sale in *Chambers'* mortgage deed it was provided that no sale should be made without three months' previous notice in writing having been given to the mortgagor, requiring payment of the mortgage money. No such notice was given, and, in fact, no notice could be given, *Parkinson* having died some three years before and there being no representative. It is true the mortgage deed contained the usual clause, that the purchaser of the mortgaged premises should not be required to ascertain that previous notice had been given, nor inquire into the necessity or expediency of such sale, and that the receipt of *Chambers* should be a sufficient discharge to the purchaser, and it is contended that this clause exonerated Messrs. *Hanbury*. I am of opinion that such a clause does not enable a purchaser, if he knows that notice has not been given, to sustain his purchase.

On this ground the purchase by Messrs. *Hanbury* is invalid, and the premises are redeemable by the Plaintiff. The Statute of Limitations does not apply—



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the period of time between the sale in 1834, and the filing of the bill in 1852, being less than twenty years.

It must, therefore, be declared that the Plaintiff is entitled to redeem the mortgaged premises.

June 12.  
  
*Pleading.*  
*Exception.*  
*Account.*  
*Schedule to*  
*Answer.*  
*Privilege.*

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TELFORD v. RUSKIN.

Where a Defendant who was the surviving partner in a firm of commission wine merchants, being required to set out in his answer an account of the partnership assets, liabilities and dealings for the six months preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the Plaintiff excepted for insufficiency,

**T**HIS suit was instituted against the surviving partner of the firm of *Telford* and *Ruskin*, who were commission wine merchants, for an account of the partnership transactions. The interrogatories asked an account of the particulars of the assets and liabilities of the firm at the time of the death of the deceased partner, and of the partnership dealings and transactions from December, 1858, till June, 1859, when the deceased partner died.

The Defendant made out the account required by the Plaintiff and entered it in a book, which he referred to in his answer, but refused to set it out as a schedule to his answer, on the ground that it would expose the names and private affairs of the customers of the firm.

The Court allowed the exception, and held, that the Defendant ought to have set out the account in a schedule to his answer, and that the objection, that the names of the customers were privileged, did not apply to such a case.

To this answer the Plaintiff excepted for insufficiency, and this exception now came on to be heard.

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Mr. *Baily* and Mr. *T. Stevens*, for the Plaintiff, in support of the exception, submitted, on the authority of *Drake v. Symes* (a) and *White v. Williams* (b), that the Defendant was bound to set out the account in a schedule to his answer.

Mr. *Glasse* and Mr. *Cole*, for the Defendant, supported the sufficiency of the Defendant's answer.

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I think this exception must be allowed. This is not a case in which, in order to make out the required account, the books and papers of the firm would have to be consulted and examined for a long period of years, which it would be impossible to do without enormous labour and expense, amounting to oppression. On the contrary, the Defendant admits that there is no difficulty in making out the account, and he has made it out in twelve or fifteen pages. But instead of annexing it to his answer by way of schedule, he has entered it in a book, which he says the Plaintiff must inspect if he wishes to have the account. This is a course which is not justified by the practice of the Court. The Plaintiff is entitled to have the account set out as part of the answer.

But it has been suggested that the setting out a list of debtors to the firm would be a disclosure of the pri-

(a) 8 W. R. 85.

(b) 8 Ves. 193.

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vate matters and affairs of those debtors, and might be detrimental to their interests; and reference was made to the case of bankers, and to the mischief that might ensue to their customers if their accounts were disclosed to the public. That objection, however, cannot apply in such a case as the present, where the firm were merely wine commission dealers. If it did, then the executor of any tradesman, when called upon by the residuary legatees to set out an account of the assets and liabilities, might refuse to do so on the same ground. That would be laying down a new rule, for which I know of no authority. The *dictum* of the late Vice-Chancellor, in the case of an insurance company called upon without any purpose or object to set out the names of the persons who had effected assurances with the office, is not in point.

The exception must therefore be allowed.

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June 21.

*Practice.*  
*Suit by Bill.*  
*Administration*  
*Summons.*  
15 & 16 Vict.  
c. 86, s. 45.

SMITH v. SPILSBURY.

THE bill in this suit was filed for an account of the estate of the testator *Thomas Mottershaw Hubball*, which had come to the hands of *Anne Beatrice Hubball*, his widow and executrix, or into the hands of the Defendant *George Spilsbury* as her representative; and the only question was, whether the suit was properly commenced by bill, and the Plaintiff was entitled to his costs, or whether, under the 45th section of the Act for the Improvement of the Jurisdiction of Equity (a), the suit should have been commenced by summons at Chambers.

The testator *Thomas Mottershaw Hubball* died in 1829, having by his will dated the 4th of November, 1823, given such of his plate, linen, china and other household furniture as his wife *Anne Beatrice Hubball* should make choice of to her for life, and after her death to his children equally on their attaining twenty-one; and the testator gave all the rest, residue and remainder of his personal estate to his wife, her executors, administrators or assigns, upon trust to invest the same and apply the interest, in her discretion, for the maintenance and education of his children, and to accumulate the residue to pay certain charges and legacies given by the will.

The widow proved the will, and it was alleged had a clear balance after payment of all debts.

The testator at the time of his death had six children.

(a) 15 & 16 Vict. c. 86.

Where a bill was filed for the administration of the testator's estate, and sought to charge the representative of the testator's executrix, on the balance of an account, and such representative had offered to pay a sum in full, but had refused to account, and there was a question on the construction of the will to be decided.

Held, that the suit was properly instituted by bill; and that the case was not one for an administration summons under the 45th sect. of the 15 & 16 Vict. c. 86: and therefore that the Plaintiff was entitled to his costs.

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The eldest son died in 1836, having attained twenty-one; another son died in 1843, an infant; one of the daughters attained twenty-one, and married the Plaintiff *Thomas Cartwright Smith*, and died in 1844, leaving the Plaintiff and several children surviving her; and two other daughters died infants in 1846, leaving the remaining child, the wife of the Defendant, and the testator's widow surviving.

The testator's widow died in 1857.

The Defendant *George Spilsbury*, who was a solicitor, had been employed by the testator's widow in the management of the testator's estate.

The bill charged that during the widow's lifetime the Defendant told the Plaintiff that all would be settled after the widow's death, but that since her death he had alleged that there was no clear residue, but stated that he had about 400*l.* in his hands which were the proceeds of the sale of some furniture, and that he had offered, upon the Plaintiff waiving an account, to pay a round sum of 500*l.*

Under these circumstances the Plaintiff filed his bill seeking an account of the testator's estate come to the hands of the testator's widow, or to the hands of the Defendant as her representative. The bill also raised some questions of construction as to the interest taken by the testator's children under his will.

Mr. *J. H. Palmer* and Mr. *Martindale*, for the Plaintiff, submitted that the suit was properly commenced by bill, and did not come under the 45th section of the 15 & 16 Vict. c. 86, the suit being for the administration not only of the estate of the testator, but also of

the estate of his executrix; and that *George Spilsbury*, the widow's representative, though he had offered a round sum in discharge, had refused to render an account. Questions of construction also arose, as to which inquiries had been directed. The Plaintiff was therefore entitled to his costs.

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Mr. *Glasse* and Mr. *W. Buxton*, for the Defendant, contended that the suit ought to have been commenced by summons, under the 15 & 16 Vict. c. 86, s. 45, and therefore that the Plaintiff ought to pay the extra expense occasioned by his having filed the bill; *West v. Laing* (a); *Fuller v. Green* (b).

THE VICE-CHANCELLOR.

The only question is with regard to the suit having been commenced by bill and not by summons. As the relief sought is not only an administration of the testator's estate, but to make the representative of the testator's representative liable for the balance of an account, and some parts of the relief asked could not have been granted on an administration summons, I think the proper course has been taken. As, however, I felt some doubt on the matter, I sent a question to the Chief Clerks as to the practice in such a case, and they tell me that they are not aware of any case of the kind having come before them. I must therefore consider that it is not the practice to proceed in such a case by summons at Chambers. One plain reason why the suit was properly commenced by bill is, that there was a point of construction on the will to be decided.

I think, therefore, that the Plaintiff was justified in filing the bill, and that he is entitled to his costs.

(a) 3 Drew. 331.

(b) 24 Beav. 217.

1860.

25th June.

*Acts of Par-  
liament.  
Company.  
Jurisdiction.  
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### ATTORNEY-GENERAL v. GREAT NORTHERN RAILWAY COMPANY.

A company incorporated by act of parliament cannot exercise its powers or apply its capital except in strict conformity with the act.

An Act of Parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing; and therefore a railway company, with the ordinary powers, was restrained from carrying on the business of coal merchants, at the suit of the Attorney-General, on the relation of a stranger to the company.

**T**HIS was an information by the Attorney-General at the relation of *Thomas North*, who was a stranger to the company, against the *Great Northern Railway Company* and the chairman.

It alleged the incorporation of the company for making and maintaining a railway; that the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act were incorporated in the special railway act; that neither of the acts recited nor any other acts enabled the company to trade in coals, nor to employ the funds of the company otherwise than for making and maintaining the railway, stations, works, &c. and for carrying on the ordinary business of a railway company, and that it had the usual powers of such companies and no others. It then alleged that the company carried passengers, and also coals for coal merchants and others; and then it alleged, and this was the ground of dispute, that the company also dealt largely in coals, buying and selling in competition with other coal merchants; that they endeavoured to conceal that fact by certain contrivances, but that in fact they acted as a company as coal merchants to an enormous extent; and it prayed that the company might be restrained from so dealing, and from employing their funds

The 7 & 8 Vict. cap. 85, sects. 16, 17, and the 17 & 18 Vict. cap. 31, do not take away the jurisdiction of the Court or of the Attorney-General.

in such business. The fact of the trading was clearly proved.

Sir *H. Cairns*, Mr. *Giffard* and Mr. *Baggallay*, appeared for the Information.

Companies of this kind are created for specific purposes and no other. The *Great Northern Company* had powers given to it for making and maintaining a railway, and for carrying upon it, but not for dealing as merchants. They never asked parliament for such powers; if they had asked, one knows from the experience of these matters what would have been the answer; at any rate they never did represent to parliament that they intended to deal with their funds as merchants; and those who would have been interested in opposing that prayer were not before parliament; *Attorney-General v. Brown*(a); *Blakemore v. Glamorgan Canal Company* (b).


Upon the broad rule, there can be no doubt. A company has no powers except those which are expressly given to it by parliament; and this company has no powers to apply their capital to buying and selling coals.

But then it is said, though a shareholder might file such a bill, the Attorney-General cannot alone sustain an information on behalf of the public. But wherever the public sustains an equitable injury, the Attorney-General is the proper party to sue. The act is a contract with the public, and the public has an interest in enforcing its strict performance.

It is immaterial whether actual commercial injury is

(a) 1 Swanst. 265.

(b) 1 Myl. & K. 162.

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shown or not. The right of the public is to have the contract adhered to. That if it were necessary, it is plain that here there is public injury. There is tendency to a monopoly. It is proved that the company have engrossed already the larger part of the northern coal fields. If they may persist what is there to prevent them from applying their vast capital to drive every other coal merchant out of the field?

They cited also *Rogers v. Oxford &c., Company (a)*.

Mr. Rolt and Mr. T. Stevens for the company. First, the Attorney-General has no jurisdiction; the suit is wrong, even if there be a right in anybody. It would be to assert that the Attorney-General has jurisdiction to keep all companies in order.

The Attorney-General's jurisdiction over corporations is the same as that over individuals, no more; to let it in you must show nuisance or breach of trust or the like. What is there in carrying on a trade which concerns the Attorney-General in a corporation more than in an individual?

Well, then, as to monopoly, it is said that gives jurisdiction? It is not necessary to consider whether it would in the abstract, for there is no monopoly made out here. The company have at most three-fourths of the trade. But the great objection to the bill is, that the company are not doing anything in itself unlawful. It is quite true they may not contravene the powers given to them; but does that deprive them of the right of using their capital in anything in itself not unlawful. They do not require parliamentary powers to buy and

(a) 2 De Gex & Jones, 674.

sell coals. They are doing that *dehors* the act, on their right in common with other persons.

Besides, the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 3) gives jurisdiction to the Court of Common Pleas and excludes all other jurisdiction. The injury, if there be any, is within the 2nd section of that act.

If the jurisdiction contended for exists, where is it to stop? Suppose a life insurance company? Could any stranger file an information to restrain them from effecting marine insurance?

The wrong complained of is not in itself an illegal act as against the public—it may be as against a co-shareholder; and he might file a bill; but the Attorney-General cannot.

They cited *Attorney-General v. Birmingham & Derby Railway Company*(a); *Attorney-General v. Brown* (b).

Mr. Giffard was not called upon to reply.


The VICE-CHANCELLOR.


I shall consider the several points in an order somewhat different from that in which they were argued.

With regard to the question of fact, that the *Great Northern Railway Company* have for a long period been dealers in coal, I can entertain no doubt. It appears that from the year 1852 this practice has been continued. They have been buying very large quan-

(a) 2 Railw. Cas. 124.

(b) 1 Swans. 265.


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ties of coal; and some portion was no doubt necessary for the working of their railway; but that portion was comparatively small; by far the largest portion of it was purchased for the express purpose of being sold, and was, in fact, sold, and the proceeds have gone into the coffers of the company. By a crafty contrivance, the company have kept the fact concealed until a very recent period. The company induced coalowners to appoint as their nominal agent a person whom the company nominated, so as to make it appear that such person was selling the coal as the agent of the coalowners, and not as the agent of the railway company. But the contract between the railway company and the coalowners was this, that the company paid the coalowners so much per ton (say 13s.), and the coal vendors from the time the coal was delivered to their nominal agent, who was, in fact, the agent of the company alone, had nothing more to do with it. It belonged to the company, was brought by them to *London*, and the proceeds of the sale were carried to the railway traffic account. This crafty contrivance has now been discovered; and it is clear from the evidence that the company have for a long time been buying and selling coal for profit.

The next question is, whether this is a legal act; and it appears to me that the case is hardly arguable on this point. An Act of Parliament constituting a railway company may for many purposes be regarded as a contract as between the promoters of the company and the public, as well as a contract among the shareholders. And although the act may contain no prohibition in express terms against the company's engaging in any business, except to construct and maintain the railway, there is in every such act an implied contract


to that effect. This principle is often acted on as between the different shareholders in the same company, and if the great body of shareholders agree to carry on a business different from that for which the company was constituted, a single shareholder has a right to say that it shall not be done, and may apply for and obtain an injunction. In the case of *Colman v. The Eastern Counties Railway Company* (a) at the Rolls, where steamers were started by the company to run from *Harwich* to the *Continent*, a single shareholder applied for and obtained an injunction, though it was found in that case, that he bought shares in the company for the very object of preventing it, he being in the interest of a rival navigation company. The motive of the applicant has nothing to do with the matter. The act is against law, and against the contract between the shareholders; and it is also against the implied contract created by the Act of Parliament, as between the company and the public.

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The next question is, what effect this dealing in coal has upon the rights and interests of the public; because I agree with Mr. *Stevens*, that the question here is, whether this sort of proceeding is attended or threatens to be attended with such injury to the public that this Court should interfere to prevent it.

Now why has the rule been established, that railway companies must not carry on any business other than that for which they were constituted. It is because these companies being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating

(a) 10 Beav. 1.


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influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private traders out of the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured. It is hardly possible to make out a case affording a better illustration of the principle than the present. This company have by means of their railway the command of the traffic and carriage of goods from the north of *England* to *London*: if they are allowed to deal in coal, their object of course must be to purchase coal at the lowest price, in other words to drive the coal-owners into selling their coal to the company on terms most favorable to the company; and this power the company are enabled to exercise by putting impediments in the way of the transmission of the coal of such coalowners as might refuse to sell to the company, as well as of all rival dealers in coal; and thus in time all rival coal-dealers carrying on their business between the north of *England* and *London* would be driven out of the field, and the coalowners would have no resource but to submit to the terms of the company; and when the company had thus acquired a monopoly of the trade in coal along their line, no one can doubt what effect would be produced on the interests of the public. From 1852 to 1857, the amount of their business in coal increased from 3,000 to more than 70,000 tons; and there is no reason why, if they are allowed to continue the practice, they should not get into their hands the coal trade of the whole district from or through which their railway runs. If they are to be permitted to do so with respect to coal, why should they not become dealers in corn, or any other kind of commodity, for the district through which the line of railway runs? I do not see where it would stop. I

am satisfied that the practice of the company which is complained of by this information, is fraught with injury to the public interests.

The only remaining question is this: whether, if the interests of the public are injured or endangered by the practice complained of, it is competent for the Attorney-General, *ex officio* or on relation, to file an information to prevent it.

On this point I entertain no doubt whatever. Wherever the interests of the public are damnified, by a company established for any particular purpose by Act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the Attorney-General to protect the interests of the public by an information; and that where, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers, for purposes not warranted by the act creating it, it is competent for the Attorney-General, in cases of injury to public interests from such a cause, to file an information for an injunction. The cases in which the Attorney General comes forward on behalf of the public, to ask this Court to restrain a nuisance, are an illustration of this principle. A nuisance may be detrimental to the public or to an individual; and it is very usual for the Attorney-General to come forward for an injunction to restrain it, so far as it affects the public, just as an individual may apply for an injunction to restrain it, where it affects himself. It is true that every injury is not a nuisance; but the right of the public to be protected against injury by the information of the Attorney-General, is not confined to those injuries which come within the strict

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definition of a nuisance. Where it is the interest of the public to prevent an illegal act, such as this, being committed, it is competent for the Attorney-General to file an information to restrain it.


It has however been contended that as the Act of the 7 & 8 Vict. c. 85, ss. 16, 17, prescribes a particular remedy in such a case, the Attorney-General cannot take proceedings otherwise than in accordance with the terms of that provision.

This objection in truth involves the contention, that this Court has no jurisdiction to entertain the suit by the Attorney-General, unless it is instituted under the circumstances mentioned in those sections.—[His Honor referred to sections 16 and 17 of 7 & 8 Vict. c. 85.]

The effect of those sections is not to take away either the right of the Attorney-General to file such an information at his discretion, although there is no certificate of the Board of Trade, or the jurisdiction of the Court to entertain such a suit. The only effect is, that if the Board of Trade has certified to the Attorney-General, he is *bound* to act and compel the railway company to abstain from doing that which is in violation of the law; in that particular case he can exercise no discretion, he must sue; and not only is the discretion of the Attorney-General taken away in that case, but if the judge finds that the acts are not authorized by the law, *his* discretion also is taken away, and he is bound to grant the injunction.

It was then said, that, by virtue of the 17 & 18 Vict. c. 31, the proper remedy is by application to the Court of Common Pleas; but on reading that Act of Parlia-

ment, it appears to me that it applies to cases of a very different nature from the present. That act applies to cases, in which railway companies acting as common carriers have favoured certain individuals, and given greater advantages or facilities to some persons than to others. The illegal acts sought to be restrained by the present suit are of a different nature.

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I consider, therefore, the Court has jurisdiction to grant the injunction on the information; but the injunction must be so worded as not to restrain the company from selling their present stock of coal.



1860.  
June 29th.

*Bankrupt Law  
Consolidation  
Act, 1849,  
s. 130.  
Removal of  
Trustees.  
Discretion in  
the Court.  
Vexatious  
Conduct.*

*Re BRIDGMAN.*

The Court will exercise its discretion as to whether it will order the removal of a trustee on the ground of bankruptcy under the 130th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and it is not sufficient merely to show the fact of bankruptcy to induce the Court to make such an order.

**THIS** was a petition praying the removal of Mr. *Bridgman*, as trustee under a settlement executed on the marriage of the Petitioner Mrs. *Drake* with her late husband, in accordance with the provisions of the 130th section of the Bankrupt Law Consolidation Act (a), on the ground that he had some years previously been a bankrupt.

(a) 12 & 13 Vict. c. 106. By section 130 it is enacted, "That if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds or annuities, or any of the stock

of any public company, either in *England, Scotland or Ireland*, it shall be lawful for the Lord Chancellor, on the petition of the person entitled in possession to the receipt of the rents, issues and profits, dividends, interest or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent

Therefore where a trustee became bankrupt in 1855, and in 1856 obtained a first-class certificate, and had since been appointed to a position of trust, and in 1860 a petition was presented for his removal on the ground of his bankruptcy in 1855, and also on the ground of vexatious conduct; but the petition did not allege that his continuing in the trust would endanger the trust property:

*Held*, that it was not compulsory on the Court to make an order for the removal of such trustee, but that it had a discretion, and dismissed the petition with costs.

In all cases where jurisdiction is given to the Court by Act of Parliament by the words "*it shall be lawful*," those words, unless they are controlled by other parts of the act, give the Court a discretion in the exercise of that jurisdiction.

Charges of vexatious conduct, as a ground for the removal of a trustee, must be made by bill, and not by petition.

The settlement under which Mr. *Bridgman* was a trustee was executed in 1842, on the marriage of Mr. and Mrs. *Drake*, and settled certain property on Mr. and Mrs. *Drake* for their lives, and on the children of the marriage, and contained a power of appointing new trustees.

1860.  
Re BRIDGMAN.

Under this power *Christopher Vickry Bridgman* was in 1844 appointed a trustee of the settlement, and he had ever since acted as such trustee.

In June, 1855, Mr. *Drake* died.

In September, 1855, Mr. *Bridgman* became bankrupt, and in November, 1856, obtained a first-class certificate.

The petition stated that Mr. *Bridgman* had acted as a solicitor for several members of Mr. and Mrs. *Drake's* family, and had advanced to them £10,000, and that in respect of this, and for costs, he claimed a sum of 12,608*l.* That it was arranged between him and a Mr. *Froom*, the solicitor for the Petitioner, that 10,000*l.* should be paid to the assignees in full discharge for the 12,608*l.* claimed by Mr. *Bridgman*, and that in order to raise that sum a part of the trust property should be sold, and for that purpose should be vested in trustees for sale. That Mr. *Bridgman* had raised such diffi-

thereto is necessary, to convey, assign or transfer the said estate, interest, stock, funds or annuities to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds or annuities were subject to

before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues and profits, dividends, interest or produce thereof, as the Lord Chancellor shall direct."

1860.

*Re* BRIDGMAN.

culties that this arrangement could not be carried out; that Mr. *Bridgman's* object was to obtain for himself the costs of conducting the sale, and that the expense of selling the property in any other manner would be so great as to consume the greater part of the trust property. The petition prayed the removal of Mr. *Bridgman* from being a trustee of the settlement, and the appointment of a new trustee in his place.

The petition also contained charges of vexatious conduct on the part of Mr. *Bridgman* in the management of the trust since his bankruptcy, and alleged this as an additional reason for his removal from the trust. A great deal of evidence and correspondence was gone into upon this point.

Mr. *Bridgman*, in his affidavit in opposition to the petition, stated that he had practised as a solicitor for forty years, that he was solvent at the time of his bankruptcy in 1855, and that his bankruptcy was, in fact, solely occasioned through the non-payment of a sum of 4,353*l.* due to him from persons to whom he had advanced a sum of 11,000*l.*, and that if that sum had been paid, he would have had a surplus. That he was clerk to the County Court at *Tavistock*, with an income of 800*l.* a year. That he had taken the opinion of counsel as to the proposed sale of the trust property, and had been advised that such a transfer to trustees for sale as proposed would be a breach of trust. That he had never been asked to retire from the trust, but that the first notice he received of the petition was in April, 1859, and that he had never intended to be paid any costs for anything he had done in respect of the trust.

Mr. *Glasse* and Mr. *Buggalley*, appeared in support of the petition.

1860.  
Re *BRADMAN*.

Mr. *Kerslake* for Mr. *Bridgman*.

Mr. *Glasse* in reply.

The following cases were referred to:—*Ex parte Gennys* (a); *Bainbrigge v. Blair* (b); *Macdonald v. Paterson* (c).

THE VICE-CHANCELLOR.

The object of the legislature in passing the act of the 6 Geo. 4, c. 16, s. 79, and subsequent statutes relating to bankrupt trustees was, that, inasmuch as a trustee has under his control the trust property, it is important that such property should not be in the hands of a trustee who, by reason of his bankruptcy, is in a reduced state of circumstances, and it was in order to protect trust property. That was the object of the 79th section of the 6 Geo. 4, c. 16 (d), and the 130th section of the Bankrupt Law Consolidation Act, 1849, is in very nearly the same terms.—[His Honor read the section.]

By that section, a power is given to the Court to

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| <p>(a) <i>Mont. &amp; Mac.</i> 258.<br/>                 (b) 3 <i>Beav.</i> 421.<br/>                 (c) 11 <i>C. B.</i> 755.<br/>                 (d) The 79th section of 6 Geo. 4, c. 16, is as follows: "And be it enacted, that if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal</p> | <p>estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds or annuities, or any of the stock of any public company, either in <i>England, Scotland or Ireland</i>, it shall be lawful for the</p> |
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1860.

*Re BRIDGMAN.*

remove trustees and to appoint new trustees. It had been previously well settled, that property vested in a trustee merely in his fiduciary character did not pass to his assignees under his bankruptcy, and when the section was introduced in the act of the 6 Geo. 4, which gave the Lord Chancellor power to direct the assignees to convey, a doubt was suggested, whether that did not import that trust property became vested in the assignees; for it was said, why should the Lord Chancellor direct the assignees to convey, if nothing vested in them, and that was the reason why the petition in *Genny's Trust (a)*, which has been referred to, was presented; and in that case an order was asked, not to convey the estate to the new trustee, but to convey it to a purchaser; but the Vice-Chancellor said, it was well settled that trust property did not pass to assignees in bankruptcy, and on that ground refused the application.

Another doubt was suggested, whether the jurisdiction under this section could be exercised by the Court of Chancery or by the Lord Chancellor, as having

Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues and profits, dividends, interest or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary, to convey, assign or transfer the said estate, interest, stock, funds or annuities to such person or persons as the Lord

Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues and profits, dividends, interest or produce thereof, as the Lord Chancellor shall direct."

(a) 1 Mont. & Mac. 258.

jurisdiction in bankruptcy; and it was decided that the Vice-Chancellor could exercise that jurisdiction.

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Re BRIDGMAN.

The question is, whether it is the law that if a trustee has become bankrupt (no matter what the circumstances or the grounds on which he has been made a bankrupt) upon an application like the present, it is sufficient to show merely that the trustee has been a bankrupt. I am of opinion that that is not the law, and that the section in question gives the Court a discretionary power, and does not impose it as a duty on the Court to make the order upon the mere fact of bankruptcy being proved. There being nothing in the act showing that the words have a different meaning, the words "*it shall be lawful*" must be held to confer a power and jurisdiction on the Court; and that power is a discretionary power, that is, the Court has to exercise its judgment, whether upon the circumstances of the particular case it would be just and right to make the order; and I am of opinion that it is not the law, that the Court has no discretion, but is bound upon the mere fact of bankruptcy being shown to remove the trustee. If it were otherwise, great inconveniences might arise. Suppose a trustee having become bankrupt ten years previously, and having acted in the trust ever since with perfect propriety; it would be very unfortunate, if upon the application to remove him, the Court was obliged to make such an order.

In all cases where the words "*it shall be lawful*" are used in an Act of Parliament with reference to a Court of Justice, and are not otherwise controled, they give the Court a jurisdiction, leaving it to the Court to exercise its discretion according to the requirements of justice in each particular case.

1860.

*Re BRIDGMAN.*

In the present case Mr. *Bridgman* became bankrupt in 1855, and in November, 1856, obtained a first-class certificate; and it is clear from the evidence that part of Mr. *Bridgman's* assets administered under the bankruptcy consisted of a sum of 12,000*l.* which he had advanced to the family of which the Petitioner is one. And it appears that had it not been for the expense of realising his estate, he would have paid 20*s.* in the pound. This gentleman was properly considered by the *cestui que trust* not to have been rendered an unfit person to be a trustee by reason of his bankruptcy, and since that time he has been appointed to a position of trust; and it appears that there is no reason for suggesting, and it is not suggested, that his continuing to be a trustee will endanger the property.

A great deal of evidence and correspondence has been gone into to show vexatious conduct on the part of Mr. *Bridgman*, but it is not necessary for me to go into that question. If it had been necessary for me to consider it, I do not think that the case against him has been made out. But that question is entirely irrelevant to this petition, which is presented under the 130th section of the Bankrupt Law Consolidation Act. It might be relevant to the petition to show that by reason of his bankruptcy the trustee is not a fit person to continue in the trust; but it certainly is not relevant to the petition to show that he has since the bankruptcy been guilty of vexatious conduct.

Bankruptcy is a ground for the removal of a trustee where it endangers in the smallest degree the trust property, but the intention of the legislature was, that when a trustee had become bankrupt the *cestui que trust* should apply at once to the Court for the removal of the trustee,

and in most of the cases the application has been made very soon after the bankruptcy occurred. But, in the present case, though the bankruptcy occurred in 1855 and the bankrupt obtained his certificate in *November*, 1856, all parties have since dealt with Mr. *Bridgman* on the footing of his being a proper person to be a trustee, and it is only when a dispute has arisen and the parties think that the trustee is acting vexatiously that they come forward and, without suggesting that the bankruptcy has made him a less proper person to be a trustee, they seek to remove him by petition under the Bankruptcy Act on the ground of vexatious conduct. If any charge of vexatious conduct is made against a trustee it must be by bill, and not by petition under the Bankruptcy Act. I must therefore dismiss the petition with costs.

1860.

*Re* **BRIDGMAN.**

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1860.  
June 29th.

*Disclaiming  
Trustee.*

*Disclaimer at  
the Bar.*

FOSTER v. DAWBER.

Upon a petition for the appointment of new trustees by the Court, it is not necessary that a disclaiming trustee, who has never acted, should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient.

**JOSEPH CLARK** by his will, dated the 8th day of *December*, 1848, gave two sums of 700*l.* and 300*l.*, secured by mortgage, and the mortgage securities, to *James Popple* and *John Clark Foster*, upon certain trusts, amongst others to pay the interest to *Eleanor*, the wife of *Robert Dawber*, for her life, for her separate use, with certain trusts after her death. *James Popple* declined to accept and never acted in the trust under the will, but he executed no deed of disclaimer. *John Clark Foster* alone took upon himself the trust and he instituted the above suit to which *James Popple* was no party.

*John Clark Foster*, desiring to retire from the trust, presented a petition entitled in the suit and also in the Trustee Act of 1850, stating his desire to retire from the trust, and asking the appointment of two new trustees in the place of himself and of *James Popple*.

Mr. *Nalder* appeared in support of the petition.

Counsel for *James Popple*, who had not been served with the petition, disclaimed at the bar.

Mr. *Charles Wood* for the *cestui que trust*.

The only question was whether the disclaimer on behalf of Mr. *Popple* at the bar was sufficient, or whether it was necessary that he should execute a deed

of disclaimer. In *Re Ellison's Trust* (a), the Vice-Chancellor *Wood* thought it doubtful whether the disclaimer by counsel at the bar was sufficient, and directed a retiring trustee to execute a deed of disclaimer.

1860.  
  
 FOSTER  
 v.  
 DAWBER.

The VICE-CHANCELLOR said he was of opinion that it was sufficient that a renouncing trustee should disclaim by counsel at the bar, and, upon such disclaimer, he made the order for the appointment of two new trustees according to the prayer of the petition.

(a) 2 Jur. N. S. 62.

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BAXTER v. WEST.

**THIS** was a bill for a dissolution of partnership between the Plaintiff and Defendant.

The partnership had been carried on for some time. It was contended for the Plaintiff, firstly, that there were no written terms, and that it was a partnership at will. The Defendant referred to a memorandum in writing prepared by the Plaintiff and sent to the Defendant for approval, but never signed; and upon the terms therein expressed the partners had acted. One of the terms was that the partnership was to be for seven years. The Court held that the partners had treated the memorandum as the basis of their partnership and were bound by it. The Plaintiff also contended that he had power to give, under the memorandum, and had given, a valid notice of dissolution, but the Court was of opinion he had not.

July 2.  
  
*Partnership.*  
*Dissolution.*

Where partners, who are so under contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will, of its own authority, dissolve the partnership, against the will of one of the partners.

1860.  
BAXTER  
v.  
WEST.

The only remaining and, in fact, only important question was, whether the Court could decree a dissolution before the expiration of the term, and in the absence of power in either party to dissolve by the terms of their agreement; on the footing of the conduct of one or of both parties. The Defendant resisted the dissolution.

It was shown in the evidence, that for a long time both parties had been in a state of quarrel; that one of the parties had on many occasions gone to the counting-house early, and before the regular business hours, and received and opened letters, and not communicated with his partner thereon; on the other side, acts of unwarrantable dictation were proved; and, on the part of the Defendant, certain acts were proved calculated to destroy confidence in him as partner. The result of the whole evidence was, that whatever one partner desired the other objected to; and that they differed on the construction of their articles, and on almost every point in the conduct of business, and were in fact in a state of total, violent and continual animosity and opposition to each other. The only question was, whether the Court has jurisdiction, under such circumstances, to decree a dissolution, one party desiring to continue the partnership.

Mr. Glasse and Mr. H. Clarke for the Plaintiff.

Mr. Baily and Mr. Ellis for the Defendant.

*Goodman v. Whitcomb (a)*, and *De Berenger v. Hammel*, referred to in *Jarman's Bythewood (b)*, were cited.

(a) 1 Jac. & W. 592. (b) Vol. 7, p. 83, art. "Partnership."

The VICE-CHANCELLOR :

It is quite clear that this partnership cannot go on satisfactorily. Of course I can only decide on the facts in evidence. The Plaintiff insists, first, that there was dissolution by notice ; that point I have already decided. Next, he says the Court ought now, on account of the conduct of the Defendant, to decree a dissolution. The grounds on which he so contends are, firstly, that there is a clause in the agreement under which he is entitled to dissolve. The articles consist of a memorandum not signed, but prepared by the Plaintiff and handed to the Defendant, and both parties agree that that instrument describes the terms of the partnership, so that I must consider this instrument as partnership articles binding on both parties. [His Honor then observed upon the terms of the articles, and stating that this point was not of much materiality, held that on their construction the Plaintiff was not entitled to a dissolution. He dealt in like manner with another point, and then proceeded :]—

The third and fourth grounds are these : first, it is said that the misconduct of the Defendant has been such, and that he has so acted in breach of the terms of the agreement, that the Plaintiff has a right to a dissolution. Secondly, it is said that by the conduct of both parties, assuming faults on both sides, all mutual confidence is destroyed, and that it is to the detriment of both that they should continue linked together. Now, with regard to the charge of misconduct of the Defendant, I think that neither party has behaved as he ought to have behaved. The Plaintiff seems to have looked upon himself as *dominus*, and to have acted in a manner in which he ought not to have acted ; to have attempted a right of dictation to which he was

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BAXTER  
v.  
WEST.

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BAXTER  
v.  
WEST.

not entitled. The Defendant has also done many acts which he ought not to have done.

[His Honor then went into an examination of the acts of the parties, and concluded by saying that the conduct of both had been bad, but that of the Defendant the worse of the two. He then continued :]—

Now in this state of things, a state brought on by improper conduct on both sides, it is clear that the continuation of the partnership, must be pernicious to both parties. It appears to me that if they continue partners, the longer they so continue, the worse matters will become. Each is charging the other with breaches of duty; and the acts of the Defendant have been sufficient to destroy the confidence of the Plaintiff. It is for the benefit of both parties that a dissolution should take place.—[His Honor then referred to *De Berenger v. Hammel*, and *Goodman v. Whitcomb*, and said he thought that upon those cases, he was authorized in exercising the jurisdiction, and he accordingly decreed a dissolution.

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1860.  
June 28th and  
30th.

Will.

Construction.  
Judgment.  
Statutes 1 & 2  
Vict. c. 110,  
s. 13.

SEYMOUR v. LUCAS.

THIS was a suit for the administration of the estate of *James William Chadwick*, the testator in the cause, and the only question of importance argued turned on the effect of a clause in the testator's will, and the application thereto of the 1 & 2 Vict. c. 110. Mr. *Chadwick* gave certain real and leasehold estates to trustees, upon trust for his son *Frederick Richard Chadwick* for life, subject to the following proviso:—"Provided always, and he directed that in case his said son *Frederick Richard Chadwick* should at any time or times thereafter become bankrupt, or take the benefit of any Act or Acts of Parliament for the benefit of insolvent debtors, or should make any assignment for the benefit of his creditors, or should convey, assign, charge or incumber or otherwise part with his interest of and in the said rents, issues and profits, or any part thereof, or if the said rents, issues and profits, or any part thereof, should by the act or default of the said *Frederick Richard Chadwick*, or by operation of law or otherwise howsoever, become vested in or payable to any person or persons whomsoever other than the said *Frederick Richard Chadwick*, then and in any or either of such cases the trusts thereinbefore contained for the benefit of the said *Frederick Richard Chadwick* should cease and determine and become absolutely void to all

Testator limited real and personal estate to trustees for *A. B.* for life; with a limitation over in case he should thereafter become bankrupt or insolvent, &c., or if by his act or default the rents, &c. should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will; there was the usual power of attorney, and judgment was entered up, but nothing further done, and the tenant

for life did not in any manner alienate after the date of the will.

*Held*, I. That judgment, without more, only operated as an equitable charge, and did not vest the rents in or make them payable to the assignees.

II. That upon the authorities, and in particular *Manning v. Chambers*, the insolvency before the date of the will was within the words "shall thereafter become bankrupt," &c.

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SEYMOUR  
v.  
LUCAS.

intents and purposes whatsoever, as if the said *Frederick Richard Chadwick* were dead, and thenceforth during the remainder of the life of the said *Frederick Richard Chadwick* the said rents, issues and profits should be held in trust for the person or persons to whom the said rents, issues and profits would be payable under the trusts or provisions thereafter contained in case the said *Frederick Richard Chadwick* were actually dead." The gift over was for life to Mrs. *Chadwick*, and after the death of the survivor to their children.

The testator died in 1854. The usual decree for accounts was made on the 20th March, 1858. On further consideration, which now came on, it appeared that *Frederick Richard Chadwick* had not since the date of the will become bankrupt or insolvent, or taken the benefit of any act for the benefit of insolvent debtors, nor had otherwise alienated his life interest. But in June, 1844, before the date of the will, he had filed a petition in the Insolvent Debtors Court under the 1 & 2 Vict. c. 110, and a vesting order was made in the same month. He was discharged in July, 1844, on executing the usual warrant of attorney for 800*l.* to the assignee in insolvency. Judgment was not entered up till June, 1859, since which nothing had been done; and the question submitted by the Chief Clerk was, whether by virtue of the order and warrant of attorney and judgment, the rents and profits became vested and payable to any other person than *Frederick Richard Chadwick*.

Mr. *Speed* opened the points for the Plaintiff, the executor, requiring the judgment of the Court.

Mr. *F. C. J. Millar* for *Frederick Richard Chadwick*.

Nothing has been done to affect the life interest of

*Frederick Richard Chadwick.* The question is one of intention ; the testator expressly points at a subsequent insolvency ; an insolvency to take place thereafter. It would be impossible to suppose he was ignorant of the fact of his son's insolvency, and if he knew it, it would be absurd to impute to him an intention to give an estate, void in its very inception. He must have contemplated a future insolvency, and there has been none. The word *become* indicates a beginning of the state of insolvency ; a man who is insolvent is not continually thereafter *becoming* insolvent.

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SEYMOUR  
v.  
LUCAS.

Then as to the latter part of the clause, no acts done since the will, vest the rents in the assignee or make them payable to him. The judgment gives him a charge which he may enforce, that is all ; but it does not give him a right to receive the rents, or vest them in him. The life estate of *Frederick Richard Chadwick* remains therefore untouched. Whether any future step of the assignee may vest the rents in the assignee, it is not material to argue ; it is sufficient that no such step has been taken, and non constat that it ever will be taken, or that any step the assignee may take would be allowed by the Insolvent Debtors Court to have that effect.

Mr. *Anderson* and Mr. *Osborne*, for the assignee, adopted the same line of argument, as to the events not having happened, that would accelerate the limitation over ; and in answer to the observation, that if the life estate remained in *F. R. Chadwick*, they had no *locus standi*, they insisted on their judgment, as giving them a right to apply for leave to issue execution if they thought fit.

Mr. *Karslake* for the children, the remaindermen.

The words used in the will, though in ordinary



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SEYMOUR  
v.  
LUCAS.

language they contemplate future acts, include according to the authorities, an existing insolvency. In truth "thereafter become" is construed "thereafter be." At any rate the judgment was an act subsequent, which giving a charge upon the whole estate vested the rents in the assignee, if it did not make them immediately payable to him. He cited *Manning v. Chambers* (a); *Yarnold v. Moorhouse* (b); *Thorner v. Wilson* (c); *Wynne v. Wynne* (d); *James v. Durant* (e).

The VICE-CHANCELLOR (after stating the terms of the will proceeded):—The question is, whether any one of the several events pointed out has happened, because it may be that some one of them has happened, though the others have not. Now I will not consider them in their order, but take the last first, "if the said rents, issues," &c. (f). Upon that the question is, whether by any means the rents have become vested in or payable to any other person than *Frederick Richard Chadwick*, and I am of opinion that they have not. There was an insolvency; but it does not signify on this part of the case, whether it was prior or subsequent to the death of the testator. The question is only, have the rents become payable to or vested in the assignee. Now there was the usual warrant of attorney executed, and judgment has been since entered up, and that is all, nothing further has been done. What then is the effect of the judgment entered up? It is that under the 13th section of the 1 & 2 Vict. c. 110, judgment shall operate as a charge; it will operate precisely in the same way and to the same extent as if there had been an agreement by *F. R. Chadwick* with the assignee, to give him a charge; it has

(a) 1 De Gex &amp; Sm. 285.

(d) 2 Keen, 778.

(b) 1 Russ. &amp; My. 364.

(e) 2 Beav. 177.

(c) 4 Drew. 350.

(f) Page 177.

no greater effect. Now if there had been such a contract, would that make the rents vested in or payable to the assignees? I think not. The party having the charge might institute a suit to obtain the benefit of his charge, but he would have no immediate right to receive the rents, nor would they be vested in him. I think therefore that the event last referred to has not happened.

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v.  
LUCAS.

Then, on the first part of the proviso, the question is, whether the insolvency happening before the testator's death is within the words "shall at any time or times thereafter become," &c. Now several cases have been cited, and in particular *Manning v. Chambers* has been relied on. — [His Honor referred to the particular language of the clause in that case, and observed that the words certainly indicated future events, and not anything already done. He referred to *Wynne v. Wynne* and *James v. Durant*, with a similar observation on the future character of the language used, and proceeded:] — Now these authorities appear to me so strong, — the language used in the clauses there, held to include past acts, are in themselves so strongly words of future import in their ordinary sense, — that I do not see how I could hold the language of the proviso in this case, "shall at any time or times hereafter," not to include the existing insolvency, without overruling those authorities, though if those authorities did not exist I think I should have done so. It appears to me, therefore, that I am bound to decide that the event contemplated has happened, and that the limitation over takes effect.

The declaration was in the terms of the will, and the assignee was allowed his costs on the authority of *Manning v. Chambers*.

1860.

26th June.

Executors.  
Undisposed of  
Personally.  
Crown.

## DACRE v. PATRICKSON.

Where personalty was bequeathed to persons upon trust for a charity, which failed under the Mortmain Act, and there were no next of kin:—*Held*, that the executor was trustee for the crown.

**THIS** was a bill for the execution of the trusts of the will of *Hugh Patrickson*; and one question was, whether, where there was a gift to executors of money to be laid out in mortmain, and no next of kin, the executors take beneficially or as trustees for the crown.

*Hugh Patrickson* duly made and signed his will and testament in writing dated the 23rd day of September, 1858, which, so far as is material, was as follows:—

I give and bequeath all my farming stock, crops and husbandry utensils, horses, cattle, carts and carriages, and also all my ready money, bills, notes and securities for money, and all other my personal estate whatsoever and wheresoever, and of what nature or kind soever (except my household furniture, plate, linen, china, wines, liquors and household stores, which I give and bequeath to *Margaret* my wife), unto *John George Waugh*, of *Ridge House*, in the said county, esquire, the Reverend *William Dacre*, of *Irthington*, in the said county, clerk, and *John Robinson*, of *Brampton*, in the said county, gentleman, their executors and administrators, upon trust, as soon as conveniently may be after my decease, by public sale or private contract, to convert into money all my said farming stock and crops, and all other my said personal estate (except as aforesaid) which does not consist of ready money, and then upon trust to stand possessed of the money to arise from such sale or conversion of my said personal estate,

and also of all my ready money, upon trust, in the first place, to lay out and expend the sum of 1,000*l.* in the building, erecting and completing a church in connection with the Established Church of *England* (to be called the Church of *St. Margaret*), and a parsonage house near thereto, at *Hethersgill*, in the parish of *Kirklington*, in the said county, and then upon trust to invest the whole of the balance of the said trust funds so to arise as hereinbefore mentioned upon real and government security, for the purpose of forming and raising a perpetual endowment fund for the maintenance and support of the minister who may for the time being be the incumbent of the said church.

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 DACRE  
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Then follow directions for the patronage of the church.

The testator appointed the said *John George Waugh*, *John Robinson* and *William Dacre* (who is the Plaintiff in the suit) joint trustees and executors of his said will.

The testator died on the 14th of November, 1858, without having revoked or altered his said will, leaving *Margaret Patrickson*, a Defendant, his widow, him surviving. *John George Waugh* and *John Robinson* both renounced probate of the will, which was, on the 21st day of January, 1859, duly proved by the Plaintiff alone in Her Majesty's District Court of Probate at *Carlisle*.

The Plaintiff claimed to be entitled to a moiety of the money bequeathed in mortmain.

*Mr. Baily* and *Mr. W. P. Murray*, for the Plaintiff.

The whole of the real and personal estate is devised

1860.

DACRE

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and bequeathed to the Plaintiff. There can be no doubt about the failure of the charitable gift; there are no next of kin; the Plaintiff is therefore, as legal donee named, entitled to a moiety. The 11 Geo. 4 & 1 Will. 4, c. 40, do not apply as between the Plaintiff and the crown, in whom there is no equity whatever. They only apply for the benefit of next of kin. They cited *Ellcock v. Mapp* (a); *Russell v. Clowes* (b); *Cradock v. Owen* (c); *Collis v. Robins* (d).

Mr. *Shapter* and Mr. *Brodrick* for the widow.

Mr. *Wickens*, for the crown, contended that the crown was entitled, on the authority of *Dawson v. Clark* (e); *Read v. Stedman* (f); *Southouse v. Bate* (g); *Bennet v. Batchelor* (h). The acts cited did not confine the case to next of kin; what they intended was, that the executors, if the will does not shew them to be intended to take beneficially, shall take as trustees for the next of kin, or whoever stands in the place of the next of kin, that is, the crown, where there are none.

Mr. *Baily* in reply.

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The question here is, whether the executors are entitled to any beneficial interest in the personal estate bequeathed on a trust which fails. The rule, irrespectively of the statute, is clear. The appointment of executors is a gift to them of the personal estate; and a Court of Equity will not deprive them of the beneficial

- (a) 2 Phill. 793; 3 H. of  
L. Cas. 492.  
(b) 2 Col. C. C. 648.  
(c) 2 Sm. & Giff. 241.  
(d) 1 De Gex & Sm. 131.

- (e) 15 Ves. 409.  
(f) 26 Beav. 495.  
(g) 2 Ves. & B. 396.  
(h) 1 Ves. jun. 63.

interest, unless it sees that a strong and violent presumption arises from the will, that the intention of the testator was that the executors should not *virtute officii* take the personalty; and if there is that violent presumption, then a Court of Equity holds the executors trustees for the next of kin.

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There have been a considerable number of cases in which the question has been, what circumstances afford a violent presumption. Among others it has been held, that if a legacy is given to the executor, that affords the necessary presumption. So, if there are two executors, and there are equal legacies given to them; but if there are two executors, and unequal legacies are given to them, that does not raise a violent presumption. So again, if a gift is made to an executor as a trustee on a specific trust, that has been held to afford a violent presumption that he is not to take beneficially. The question therefore is, whether, on the face of it, this will shows a strong presumption that the executor shall not take the moiety of the legacy that falls beneficially. Now, strictly speaking, a trustee cannot have a trust imposed upon him *virtute officii* as executor. If a trust is imposed upon him, it is in another character, viz., that of trustee; whose duty it is to carry out the trust. *Quid* executor, he cannot have a trust imposed upon him by the will. The only trust of which he is capable as executor is the trust created by the law for the next of kin. Here the gift of the personalty is expressly to persons appointed trustees of it. The testator therefore clearly intended that whoever else might, the executors should not as such take the beneficial interest. It signifies nothing that the trusts fail. If they do fail, still, it is clear, the testator did not intend the executor to take the beneficial interest; and as there are in this

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case no next of kin to take, I must hold that the executor is a trustee for the crown.

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*Exoneration.*

A charge of debts, &c. on a particular real estate, assuming it to exonerate personal estate in favor of a particular legatee, does not exonerate the person, who, on failure of that legacy by means of the Mortmain Act, takes it. And where there was also a charge of a mortgage debt on the particular real estate devised, it was held, that under the 17 & 18 Vict. c. 113, the devisee was not entitled to have the debt paid out of the personal estate, which passed, by failure of the legacy, to other persons than the legatee.

The second point arose on the following passage in the same will:—

I give, devise and bequeath “all that my estate called *Thorney Lands*, situate in the parish of *Stapleton*, in the said county, unto my wife *Margaret Patrickson* to and for her own sole and absolute use and benefit, but subject nevertheless and charged with the payment of the sum of 1,800*l.* now secured thereon by way of mortgage, and all interest due thereon, and also charged with the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will.”

The VICE-CHANCELLOR reserved judgment on this point, and on the 16th of July delivered the following judgment.

The VICE-CHANCELLOR.

The question is whether the testator intended to exonerate his personal estate from the payment of his debts and funeral and testamentary expenses, and the expense of proving his will. If, on the true construction of the will, there was an exoneration (and that is of course a question of intention and construction), then comes the question, whether, inasmuch as the bequest of the personal estate fails, the exoneration enures for the benefit, not only of the legatee, but also of those who take the personal estate on failure of the bequest; that is, in the

present case, whether the exoneration shall enure for the benefit of the widow and of the crown, who take that estate in equal moieties. As I am of opinion on the second point against the persons taking the personal estate, it is not necessary for me to determine whether the testator intended to exonerate the personal estate. For, assuming that he did so intend, the question still remains whether that intention is confined to an intention for the benefit of the charity, for whose benefit the testator gave the personalty, or whether it should enure generally for the benefit of the person taking that estate on failure of the bequest of the personalty.

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It is a general rule in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees; and, therefore, if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator, or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration; and, of course, if it goes to the crown, in the absence of next of kin, the crown is not entitled to it. That principle was clearly laid down by Lord *Thurlow* in *Hale v. Cox* (a), and by Lord *Alvanley* in *Waring v. Ward* (b); and in *Noel v. Henley* (c), in which the Lord Chief Baron *Richards* recognised the same principle. It is true that in the last case there was no intention to exonerate, but the Lord Chief Baron *Richards* in mentioning that circumstance said, that if

(a) 3 Bro. C. C. 322.

(b) 5 Ves. 676.

(c) 7 Price, 241.



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there were such an intention it would not enure for the benefit of the person taking the personal estate; so that the case clearly recognizes the principle.

But one case of *Milnes v. Slater* (a) seems at first sight to be a contrary decision: and if in that case there had been a bequest of the general personal estate for the benefit of a particular person or object, no doubt it would have been very difficult to reconcile that case with the others. But upon a close examination of that case, and of the judgment in it, it is clear that there was no bequest of the general residuary personal estate. The testator had bequeathed his real and personal estate to trustees, but in proceeding to declare the trusts he declared trusts applicable only to the real estate, leaving the residuary personal estate undisposed of; and Lord *Eldon* in his judgment says, in page 305 of the report, "The question then is, as to the effect of that as to the personal estate, in a case in which that part of the personal estate which is unapplied to the debts is given to no one by the will. Suppose he had no other property but personal estate and these mortgaged estates; and had directed merely, that the personal estate should not be applied to the mortgages; and had given the mortgaged estates to different persons, they paying out of them the mortgages. It would be very difficult in that case to say, the next of kin even should not have the benefit of it; for though the personal estate must be exempted by declaration plain, or inference as plain, it is competent to a testator so to arrange as between the next of kin and the devisee."

Mr. *Jarman* in his *Treatise on Wills* (b), in commenting on the cases, by an oversight extremely rare with him, overlooks the fact that there was, upon the

(a) 8 Ves. 295. (b) Vol. 2, p. 566, 2nd edit.

true construction of the will, no gift of the personal estate, and he speaks of *Milnes v. Slater* thus: "on the other hand, Lord *Eldon*, in *Milnes v. Slater*, expressed an opinion that if the testator having bequeathed the personal estate directed that it should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, they paying out of them the mortgages, the devisees would take *cum onere*, even as against the next of kin."

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Mr. *Jarman* endeavours to reconcile *Milnes v. Slater* with the other cases by suggesting this distinction between them, which is, in fact, no distinction at all. He says: "the distinction, it is conceived, is, that if the exemption arise from the terms in which the *personal* estate is bequeathed, and that bequest lapse, the exemption fails with it, as part of, and incidental to, such bequest; but if the *real* estate be given in such a manner as to indicate that the devisee is, at all events, to be onerated with the charge, the failure of the bequest of the personalty does not affect the situation of the devisee. This removes the seeming discrepancy between the two dicta."

Now, as I have said, the real distinction between *Milnes v. Slater* and the other cases is this, that in the latter there was an absolute bequest of the personal estate, while in *Milnes v. Slater*, there was none. The principle upon which, as it appears to me, the case of *Milnes v. Slater* was decided is this: there being no particular bequest of the personal estate, and yet the testator intending to exonerate the personal estate, it was impossible to say that he intended that exoneration for the benefit of any particular person or object, and he must be taken to have intended that the exoneration should enure for the benefit of the persons, whoever

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they might be, upon whom the personal estate might devolve.

I am of opinion then, assuming for the purpose of this question that the testator did intend to exonerate his personal estate, that such exoneration must be taken to have been intended only for the benefit of the charity, in order that the charity might take the personalty without liability; and that it does not prevail (the particular bequest having failed) in favor of the widow and the crown.

A question still remains with regard to the mortgage. The testator uses precisely the same language with respect to this as he does when speaking of his debts.

If the statute 17 & 18 Vict. c. 113, had never passed, I have no reason to doubt but that the same principle would have applied to the mortgage as to the other debts; but that statute enacts, that "when any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any other or contrary intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person."

If the clause had stopped there no question could arise, for the clause is general; and neither the devisee nor the heir would be entitled to have the mortgage discharged out of the personal estate upon whomsoever the

personal estate might devolve. But the statute goes on to say "but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof;" and it is contended, that although if the testator had left next of kin, inasmuch as they and the widow would claim through or under the deceased person, the statute would apply, yet that as to the moiety which goes to the crown, as the crown does not claim through or under the deceased person, the personal estate in the hands of the crown is still liable to discharge the mortgage debt in order to exonerate the mortgaged estate. If the latter part of the clause had stood alone, there might have been some difficulty in avoiding that conclusion; but the first part of the clause, which is general in its terms, is in truth the substantial part of the enactment, and the passage which follows is inserted for the purpose of showing that if the mortgage overrides several estates, they shall bear the mortgage *pro rata* according to the respective values of the estates; and I think that I cannot upon a true construction of the statute hold that the generality of the first part of the clause is contracted by that which follows. I am, therefore, of opinion that not only as against the widow, but also as against the crown, the devisee of the real estate is not entitled to have the real estate discharged from the mortgage by the personal estate.

The executor must pay the balance in his hands into Court. The costs of all parties must be paid out of it, and the balance paid, half to the widow and the other half to the crown.

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Where a bill was filed by a single shareholder against the directors of a banking company and the banking company, for an injunction to restrain the Directors from paying a dividend already declared, and from declaring or paying any future dividends, except out of the profits of the bank: but the other shareholders were not before the Court:

The Court granted an injunction as to future dividends, but refused to restrain the payment of the dividend which had been declared on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and that the Court would not, in the absence of the shareholders, interfere with that right.

A Plaintiff, in order to enable him to file a bill on behalf of himself and other persons, must have a common interest with such persons.

**THIS** was a motion for an injunction to restrain the Defendants, the directors of the *Union Bank of London*, from declaring or paying any dividend to the shareholders except out of the profits or surplus fund of the bank, or from paying a dividend which had previously been declared on the 20th of June, 1860, or any part thereof, and also to restrain the directors from debiting, charging or incumbering the capital of the bank with any sum of money whatever further or otherwise than the same was liable to the debts and engagements of the bank.

The bill, which was filed on the 14th of July, 1860, by *Edmund Alderson Fawcett*, who jointly with *Ann Fawcett* (one of the Defendants) had, as executors and trustees of a former shareholder, become the proprietors of 110 shares in the *Union Bank of London*, stated that the *Union Bank of London* was constituted under an indenture of settlement dated the 5th of April, 1839.

By the 5th section of this deed of settlement, it was provided that the capital of the bank should consist of 3,000,000*l.* in 60,000 shares of 50*l.* each; and by the 15th and 16th sections, the court of directors were empowered to appoint such of the directors as they should

By the 5th section of this deed of settlement, it was provided that the capital of the bank should consist of 3,000,000*l.* in 60,000 shares of 50*l.* each; and by the 15th and 16th sections, the court of directors were empowered to appoint such of the directors as they should

think fit to be trustees, in whose names the general business of the bank should be carried on.

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The 49th section of the deed provided, that if the court of directors should find that they could not employ to advantage the whole of the paid-up capital of the bank, they should have power to return any part of such capital, upon giving such notice as was required for demanding payment of calls on shares; and should also have power, on giving like notice, to recall the whole or any part of the capital so returned.

The 89th section provided, that whenever two or more persons should be jointly entitled to any shares in the bank, whether beneficially or as executors or administrators or otherwise, the person whose names should stand first in the share register book as proprietor of such shares should be deemed to be the only proprietor of such shares, and should be entitled to vote on all occasions as the sole proprietor of such shares, and that such vote should on all occasions be deemed and allowed to be the vote for or in respect of the whole property in such shares.

By the 91st and 95th sections, provision was made for reducing and diminishing the capital of the bank by a general meeting, and for confirmation thereof by another general meeting.

By the 99th section it was provided, that previously to any general meeting at which the court of directors should deem it expedient to declare a dividend among the proprietors, the court of directors should determine upon, appoint and declare such dividend *in respect of the profits of the company* amongst the proprietors as

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the court of directors should think proper, and at each of such annual general meetings the court of directors should announce to the proprietors the dividend which they should so for the time being have declared.

The 101st section provided, that no dividend in respect of the profits of the company which should be made before the annual general meeting in July, 1841, should be declared unless the court of directors should, in their discretion, deem it expedient to declare such dividend; but the amount of such profits, after defraying the expenses of or incident to the establishing of the company, and carrying on the business thereof, should be carried to an account and form part of the profits to be divided in the subsequent year, after setting apart so much thereof as the court of directors should think fit for a fund to be called the surplus fund, and in each succeeding year during the continuance of the company, the profits which should yearly arise and accrue to the company should, after setting apart such proportion of the same profits as the court of directors should think requisite for forming and maintaining the surplus fund, be divided amongst the proprietors in proportion to their respective shares, and the surplus fund for the time being should be carried to a separate account in the books of the company, and should, under the authority of the court of directors, be applied either to meet any unforeseen emergencies, losses or extraordinary demands upon the company, or to supply any deficiency which from any unforeseen circumstances might arise in the profits of any given year, so as thereby to prevent, as far as might be, any fluctuation in the amount of the dividends of profits made in successive years. And the court of directors might out of the surplus fund pay, satisfy and make good any costs,

losses, damages and expenses ; and no proprietor should be entitled to any share or dividend of or in respect of profits except his proportion of any dividend which should be declared according to the provisions of the deed.

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The 103rd section provided that the court of directors might, at such times as they might think proper, declare out of the surplus fund any sum as a bonus on all the shares on which dividends were payable, and might apportion a rateable part of such bonus to each such share; and might declare that such bonus should either be added to the amount previously paid up in respect of such shares, or be paid to the persons entitled to such shares, as the court of directors might think proper.

The bill then stated that in 1849 *Mrs. Ann Fawcett* and the Plaintiff became, as the executors and trustees of a former shareholder, the proprietors of 110 shares and executed the deed of settlement in respect of such shares, *Mrs. Ann Fawcett* being the proprietor first named in the register of the company. That the directors at the annual general meeting of the company held on the 12th of July, 1854, presented their report, stating their intention of issuing the reserved shares, and that the paid-up capital would then amount to 600,000*l.*, and that the premiums payable would raise the reserved fund to 120,000*l.*; being 20 per cent. of the paid-up capital. That *Ann Fawcett* and the Plaintiff as such trustees took 144 of the reserved shares and paid the premium and call.

The bill then stated that by a report presented by the directors to a meeting held on the 13th of July, 1859,



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after mentioning a dividend of 45,000*l.*, the directors stated that after appropriating 45,000*l.* to the reserved fund that fund would amount to 210,000*l.*, and that the state of the reserved fund thus increased had enabled the directors to carry into effect their intention of capitalizing a portion of it. That the directors had therefore realised 120,000*l.* of the reserved fund and appropriated that sum by adding 20 per cent., or 2*l.* per share, to the paid-up capital of the company. That the report of the directors was duly confirmed by the meeting; that the capitalization of the 120,000*l.* was made under the 103rd section of the deed of settlement, and that the shares of the company of 50*l.* each, which before had only 10*l.* paid up, became shares with 12*l.* paid up.

The bill then stated that in April, 1860, it was discovered that owing to the wilful neglect and default of the directors and the frauds of the chief cashier of the bank, the balance standing at the *Bank of England* in the names of the trustees of the *Union Bank*, instead of being 569,706*l.* 16*s.* 2*d.*, was only 306,636*l.* 7*s.* 4*d.*, and that after recovering a part of the deficiency the loss to the *Union Bank* would be 252,008*l.* 12*s.*

That the directors, in order to escape payment of such loss, and to prevent investigation, determined to continue the regular payment of dividends and to apply the paid-up capital to the payment of such dividends; and on the 24th of April, 1860, the directors issued a circular in which they stated the course they recommended for meeting the loss, and stated that "in July last the sum of 120,000*l.* was transferred from the reserved fund to the capital account: it is now proposed to retransfer this sum from that account, and to appropriate a further sum

of 100,000*L.*, the amount of the existing reserved fund, towards meeting the present defalcation; an application of this fund specially contemplated in the deed of settlement for 'meeting unforeseen losses.'"

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On the 4th of July, 1860, the directors issued a report to the shareholders, in which they made the following statement:—

|                                       |                       |       |
|---------------------------------------|-----------------------|-------|
| " In accordance with their report of  |                       |       |
| the 24th of April last, the directors |                       |       |
| have appropriated towards meet-       |                       |       |
| ing these frauds the reserved fund,   |                       |       |
| which has realised . . .              | £100,851              | 15 10 |
| " Now proposed to redebit capital     |                       |       |
| account with amount carried last      |                       |       |
| year to credit of that account from   |                       |       |
| reserved fund . . .                   | 120,000               | 0 0   |
| " Balance to be paid out of profits   |                       |       |
| of the year . . .                     | 31,156                | 16 2  |
|                                       | <u>£252,008 12 0"</u> |       |

On the 9th of July, 1860, the Plaintiff served on the secretary of the bank, and on the directors, a notice that he held the directors liable to the loss which the bank had sustained, and that he objected to the directors retransferring or dealing with the capital sum of 120,000*L.* proposed to be retransferred, and that he objected to the directors declaring or paying any dividend except in respect of the profits of the bank.

At a general meeting of the shareholders, held on the 11th of July, 1860, the directors' report of the 4th of July was read, and the directors were authorized to carry into effect the recommendations contained in that report; and the chairman declared a dividend of 12*s.*

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per share for the six months ending in June, 1860. The directors gave notice that this dividend would be payable on Friday, the 20th of July, 1860.

The bill stated that the Plaintiff was not present at the meeting of the 11th of July, and that the directors insisted that he had no right to attend such meeting. That the premiums were paid by *Ann Fawcett* and the Plaintiff out of the capital of an account to which they were entitled as executors and trustees; that *Ann Fawcett* was entitled for her life only to the interest of the trust property, and that it would greatly prejudice the Plaintiff and his other *cestui que trust* if the capital were debited with any sum for the purpose of paying dividends.

The bill then charged that the losses had been occasioned through the wilful default of the directors, and prayed an injunction in the terms above stated, and also a declaration that the directors were personally liable for such losses.

The Defendants to the bill were the directors of the *Union Bank*, the *Union Bank* by *Peter Northall Laurie*, one of their registered public officers, and *Ann Fawcett*.

Mr. *Glasse* and Mr. *Bates*, appeared in support of the motion.

Mr. *Daniell* and Mr. *Anderson*, for the directors, opposed the motion on the grounds that the Plaintiff had no right to sue in this Court, *Ann Fawcett*, the person whose name stood first in the share register book of the company, being the proper person to represent the shares held by her and the Plaintiff; that the Plaintiff had been guilty of laches in coming to the

Court; that the suit was not properly constituted, the shareholders not being before the Court; and that the Court would not grant an injunction with respect to a dividend which had been already declared in the absence of the shareholders; the declaration of the dividend having given to each shareholder a separate and distinct right to the sum allotted to him, and having thus created an interest in the shareholders opposed to the relief sought by the Plaintiff. They cited *Brown v. Bullen* (a); *Doe's v. Bank of England* (b); *Cole v. Bank of England* (c); *Hague v. Dandeson* (d); *Carlisle v. The South-Eastern Railway Company* (e).

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Mr. Burt, for *Ann Fawcett*, also opposed the motion.

Mr. Glasse, in reply.

**THE VICE-CHANCELLOR.**

Several questions have been raised in the course of the discussion in this case, upon some of which it is not necessary for me at present to express any opinion.

The first question raised is, whether the Plaintiff has, in fact, any *locus standi* in this Court, and that depends upon the construction of certain clauses of the deed of settlement, under which it is contended the Plaintiff is for all purposes not to be considered as a proprietor of the company, and therefore cannot sue; and, of course, if that contention can be sustained, the effect will be that, as it would be a good ground for demurrer, it would be a good ground why an injunction should not be granted:

(a) 1 Dougl. 407 a.

(b) 2 Bing. 395.

(c) 10 Ad. & Ell. 457.

(d) 2 Exch. 741.

(e) 1 M. & G. 689.

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It has also been contended, that the Plaintiff has been guilty of laches in not having taken the proper steps earlier, and that it is now too late for him to apply for an injunction, at all events so far as relates to the dividend to be paid on Friday (to-morrow).

The main ground of objection may be substantially stated thus :—The directors having under their deed power to deal with the surplus fund in one of two ways, at a general meeting held in July, 1859, exercised that power. They had power either to declare a sum as a bonus on all the shares, or they might apportion a rateable part of the bonus to each share, and it is declared that each bonus shall be carried to the amount paid in respect of the shares, or paid to the persons entitled to the shares, as the directors should think proper. In July, 1859, the directors divided 120,000*l.*, part of the reserved fund, among all the shares, giving 2*l.* to each share, and treating the 2*l.* as so much additional capital paid up on each share, that is giving credit for 12*l.* instead of 10*l.* per share.

In January, 1860, the directors declared a half year's dividend, and in April, 1860, they discovered the frauds committed by their chief cashier amounting to 250,000*l.*, and then came the question as to how that amount should be made good, and they shortly afterwards issued a circular, and it appears that had it not been for those frauds there would have been a considerable profit which would have been applicable for the payment of a dividend in July, 1860, but their language does not clearly indicate what the directors intended. Having in July, 1859, carried 120,000*l.* into the capital by giving each share credit for having paid up an additional 2*l.*, the directors proposed that that sum should now be

taken back and be restored to the surplus fund. Of course the effect of that would be, that whereas at that moment each shareholder was in the position of having paid up 12*l.* per share, he would by that means be reduced to the position of having paid up 10*l.* only; and the directors would in this way have been able to declare a dividend of 5*l.* per cent.

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On the 4th of July, a printed report was published very similar to the circular of the 24th of April; and on the 11th of July a general meeting was held, at which meeting this report was adopted and the directors were authorized to carry into effect the recommendations contained in their report.

Now the question, or rather the main question, is, whether it was in the power of the general meeting to so deal with the fund. The directors might have abstained from declaring a dividend, but the dividend was only to be declared on the adoption of the plan proposed in the report, and the directors could only suggest that such a plan should be adopted. As I have said, at the general meeting held on the 11th of July the directors' scheme was adopted; and the question is, whether the general meeting could do so, in fact, whether a majority could bind the minority.

But upon neither of the grounds I have stated do I think I ought to decide this case. I must decide it, so far as the motion asks for an injunction to restrain the payment of the dividend declared and payable to-morrow, upon the ground of the decision of Lord *Cottenham* in *Carlisle v. The South-Eastern Railway Company* (a). I have considered that case, and have come to the

(a) 1 M. & G. 689.

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conclusion that the principle upon which Lord *Cottenham* dissolved the injunction granted by the Master of the Rolls, with respect to a dividend actually declared, governs this case.

In the present case, the Plaintiff, who is a single shareholder, is suing the directors and the company as a body, but making none of his co-shareholders parties, nor does he profess himself to represent them. In the case before Lord *Cottenham*, the Plaintiff *Carlisle* held shares in a particular class, and professed to file his bill on behalf of himself and all other the shareholders, except the Defendants, against the company and various shareholders for the purpose of restraining the company from paying dividends in violation of their Act of Parliament, by which it was stipulated, that if the transfer of a particular line of railway should take place, no dividend should be declared by the *South-Eastern Railway Company*, but the company had nevertheless on two occasions declared and paid dividends. Lord *Langdale*, the Master of the Rolls, held it was a violation of the act, and that any shareholder might obtain an injunction, all having a common interest. But, in that case, on the very day on which the bill was filed a dividend was declared, so that when the injunction was applied for the dividend had been declared, and the Lord Chancellor, upon appeal, though he did not think it necessary to dissolve the injunction so far as it related to any future dividends, dissolved the Master of the Rolls' injunction so far as regarded the dividend which had been declared, on the ground that each shareholder might bring an action for that dividend, and had a right to insist on being paid such dividend, and, having that right, the Plaintiff could not sue on behalf of all the other shareholders to restrain the payment of the divi-

dend to each of them. In order to enable him to file a bill on behalf of himself and of other persons, a Plaintiff must have a common interest with them, and that the Plaintiff could not have.

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On that ground alone and on no other ground, although I will grant the injunction with respect to future dividends, I cannot grant an injunction restraining the payment of the dividend which has been declared. In the case of *Carlisle v. The South-Eastern Railway Company* (a), Lord Cottenham says, "In *Mozley v. Alston* (b), I am reported to have said—'Where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject however to this restriction, that the relief which is prayed must be one in which the parties whom the Plaintiff proposes to represent have all of them an interest identical with his own, for if what is asked may by possibility be injurious to any of them, those parties must be made Defendants, because each and every of them may have a case to make adverse to the interests of the party suing; *Taylor v. Salmon* (c); *Wallworth v. Holt* (d). If indeed they are so numerous that it is impossible to make them all Defendants, that is a state of things for which no remedy has yet been provided.' In *Richardson v. Larpent* (e), and *Evans v. Stokes* (f), the difficulty occurred, but the objection prevailed. Many cases may occur in which this difficulty must lead to a failure of justice, and it is much to be wished that some remedy could be suggested for it."

It appears to me therefore that, on the ground on which that case was decided by Lord Cottenham, I

(a) 1 M. & G. 699.

(b) 1 Phill. 798.

(c) 4 Myl. & Cr. 134.

(d) 4 Myl. & Cr. 619.

(e) 2 Y. & C. C. C. 507.

(f) 1 Keen, 24.



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cannot grant an injunction so far as relates to the dividend already declared. With regard to the rest of the prayer, it appears to me entirely unnecessary now to determine the question, and I shall therefore let the rest of the motion and case stand over till the hearing.

July 23, 24.

Construction.  
Residuary  
Bequest.  
Specific  
Legacy.  
Annuity.

## MULLINS v. SMITH.

A testator gave **THIS** was a suit for administration.

to his son all his furniture, plate, &c., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease; and

The testator *Isaac Smith*, by his will dated the 4th of October, 1855, after appointing the Plaintiffs his trustees, bequeathed to his son *John Smith* absolutely for his own benefit all the furniture, plate, linen, books, china and pictures, and all other goods and chattels whatsoever, not being money or securities for money, whereof he should be possessed at the time of his decease. The testator then bequeathed to the Rev. *Henry*

in a subsequent part of the will he bequeathed to his trustees "all my property, as well real and personal or mixed, not hereinbefore disposed of."

*Held*, that although the words "goods and chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet, that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary.

The testator also gave a legacy of 500*l.* £3 per Cent. Consols, or other Stock into which the same might be converted, or in case he should not be possessed of such Stock, then he gave a legacy of as much sterling money as that amount of Stock would have been worth at his decease; and by a subsequent clause the testator gave another legacy of like Stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate.

*Held*, that the first legacy, there being sufficient Stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general.

Distinction between specific, demonstrative and general legacies.

An annuity is included under the term "legacy."

*William Lucas* a legacy of 500*l.* £3 per Cent. Consolidated Bank Annuities (or other Stock into which the same might be converted), to *Rosa Mary Lucas* 500*l.* like Stock, to *George Lucas* 500*l.* like Stock, and to *Elizabeth Cousen* 300*l.* like Stock, or if he should not at his decease be possessed of such Stock, then he bequeathed unto each of the said four persons in lieu of such Stock legacy, a legacy of as much sterling money as the amount of such Stock bequeathed might have been worth on the day of his decease; and he directed such legacies to be transferred and paid within two years after his decease, with the interest or dividends in the meantime. The testator then devised and bequeathed all the property, as well real and personal or mixed, not thereinbefore disposed of, which at the time of his decease he might have power to dispose by will, to his trustees upon trust to sell and call in and convert into money all such parts as should not consist of money or Government Stocks or Funds, or dock shares or shares in the *Union Fire Office*, and to set apart a sum of 20,000*l.* out of the proceeds of such sale or such other Stock into which the same might have been converted, and to pay the dividends to his son *John Smith*. The testator then gave an annuity of 50*l.* to his housekeeper *Mary Dewdney*, which annuity he charged on his residuary testamentary estate, and then proceeded to give legacies to various charities. And, subject to the several legacies aforesaid, and to the payment of his just debts, funeral and testamentary expenses, the testator directed that his trustees should stand possessed of all the residue of his property real and personal or mixed, upon trust to invest and accumulate the same for twenty-one years, and thereout to pay his son's wife 500*l.*, to the Rev. *William Lucas*, in addition to the legacy already given him, 500*l.* New £3 per

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Cent. Consolidated Bank Annuities or other Stock into which the same might be converted, to the said *Rosa Mary Lucas*, in addition to the legacy already given her, 500*l.* like Stock, and to the said *Elizabeth Cousen*, wife of the said *John Cousen*, in addition to the legacy already given her, 200*l.* like Stock; and he directed that so much of his residuary estate as should consist of real estate, or proceeds of real estate or real securities, should be applied, so far as the same would extend, in the first place in payment of "the legacies aforesaid," which were legacies to individuals and not for charitable uses, to the end and intent that the gifts for charitable purposes should take effect out of his purely personal estate; and the testator directed that all the ultimate surplus of his residuary testamentary estate should be divided among thirty charitable institutions mentioned in his will.

The testator died in *February*, 1866, and his son *John Smith* in *April*, 1859.

The testator at the time of his decease was possessed of sufficient £3 per Cent. Consolidated Bank Annuities to satisfy the four legacies of Stock given by his will.

Questions having arisen as to the construction of the testator's will, the trustees instituted the present suit.

The Defendants to the suit were *Francis Smith*, the widow and universal devisee of the testator's son *John Smith*; and *John Thornton*, the treasurer of the *Church Missionary Society*, as representing that society and the other charitable institutions interested in the testator's residuary testamentary estate.

Mr. *Baily* and Mr. *C. Hoare*, appeared for the Plaintiffs, the trustees.

Mr. *Anderson* and Mr. *Hughes*, for *Frances Smith*, the widow and universal devisee of the testator's son, submitted that the gift to the son of all the testator's goods and chattels whatsoever amounted to a residuary bequest, and that, therefore, *Frances Smith*, as the son's widow, was entitled to the whole of the personalty not specifically bequeathed; *Parker v. Murchant* (a). That the proceeds of the sale of the real estate, after payment of the testator's debts, belonged to *Francis Smith* in right of *John Smith*, who was the testator's heir at law. That the legacies of Stock were specific, and must, therefore, be satisfied only out of the Stock standing in the name of the testator at the time of his death, and not out of the proceeds of the real estate, or out of the testator's general personal estate; *Townsend v. Martin* (b); *Queen's College, Oxford v. Sutton* (c); *Fontaine v. Tyler* (d); *Hosking v. Nicholls* (e).

Mr. *Amphlett* and Mr. *J. Pearson*, and Mr. *Shapter* and Mr. *Renshaw*, for the several charities entitled to the testator's residuary testamentary estate, contended that the legacies of Stock, not being specific, were payable out of the pure personalty *pari passu* only with the charitable legacies. The testator directed that the "the legacies aforesaid" meaning thereby all the legacies previously given, should be paid out of his real estate. If the realty was insufficient, the Stock might then be resorted to, but it was only to that extent that the legacies of Stock were specific or demonstrative; *Robinson v. Geldard* (f); *Tempest v. Tempest* (g). An annuity is included in a charge of legacies; *Jarman on Wills* (h).

(a) 1 Y. & C. C. C. 290.

(b) 7 Hare, 471.

(c) 12 Sim. 521.

(d) 9 Price, 94.

(e) 1 Y. & C. C. C. 478.

(f) 3 M. & G. 735.

(g) 7 De G., M. & G. 470.

(h) Vol. 2, p. 516, 2nd ed.

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Mr. *Anderson* in reply.

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The first question is, whether the bequest to the son in the commencement of the will is a general residuary bequest. It is contended on the part of the son's personal representative, that it is a general residuary bequest by reason of the words "all other goods and chattels whatsoever," and that every other bequest in the will is merely a bequest of some particular portion of the property, and no general residuary bequest.

No doubt there may be cases in which a bequest by a testator of all his goods and chattels may constitute a residuary bequest. In fact we know that civilians use the word "goods" as meaning personal estate generally. Indeed cases have been decided by this Court where even a bequest of all the testator's "money" has been held to be a residuary bequest. On the other hand it may be that the goods and chattels the testator intended were goods and chattels *ejusdem generis* with furniture, plate, linen, books, china and pictures, which he specifically mentions.

The question, whether such a gift as this is residuary, must depend mainly on the question whether any other residuary gift is found in the will; for if another residuary gift is found in the will, a clause in the terms of this gift will not be held to constitute a residuary bequest.

In the present case the testator, after the bequest in question, and after giving various legacies, proceeds to give to his trustees "all the property, as well real and personal or mixed, not hereinbefore disposed of" upon

trust to sell and convert all such parts thereof as should not consist of money or of Government Stocks or Funds or dock shares or shares in the *Union Fire Office*. Now this bequest to the trustees is in its terms a proper residuary bequest. And this alone appears to me sufficient ground for holding that the gift to the son was not intended to be a general residuary bequest.

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But further that the Government Stocks or Funds and dock shares and shares in the *Union Fire Office* are comprised in the bequest to the trustees. Now this species of property does not properly come within the description of monies or securities for money. If then the bequest to the son was a general residuary bequest, it must have comprised the Government Stocks or Funds and dock shares and shares in the *Union Fire Office*, for the only species of property which the testator excludes from that bequest to the son are money and securities for money. Therefore, to hold that the bequest to the son was a general residuary bequest, involves the absurdity of supposing that the testator intended to bequeath to the trustees some property which he had already in the prior part of his will given to his son.

I am of opinion that the bequest to the son is not a residuary bequest, but merely a gift of goods and chattels in the popular sense of that term, that is, goods and chattels *ejusdem generis* with furniture, plate, linen, books, china and pictures.

The next question is, whether the legacies of Stock are specific, or general, or demonstrative.

The testator gives certain legacies of Stock, and then says, that if he has no such Stock at his decease, then  
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he gives the value in money. That is tantamount to saying, that if he has Stock of that denomination at his decease, then he gives so many sums of Stock out of it; but that if he has no such Stock, then he gives so many sums of money out of his general estate. As the testator had Stock to answer the bequest at his decease, those legacies were specific; but if he had had no such Stock at his decease, then the bequest of the money would have been, not specific, but general legacies.

These legacies of Stock are specific legacies, in contradistinction to general and to demonstrative legacies. They are not money legacies payable out of a particular property (which would be demonstrative legacies); but they are legacies of specific portions of a particular property, which he contemplated his being in possession of at his death (which are specific legacies).

A legacy of Stock is equally specific, whether the testator says: "I give 500*l.* £3 per Cent. Consols out of the Consols now standing in my name," or "I give 500*l.* £3 per Cent. Consols out of the Consols which shall be standing in my name at the time of my decease." A Stock legacy payable out of Stock of the same denomination is specific, but a money legacy payable out of Stock is not specific, but demonstrative.

The points of difference between specific and demonstrative legacies are these :—A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of Stock, carries with it the dividends which accrue from the death of the testator; while a

demonstrative legacy does not carry interest from the testator's death.

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The testator, having given those legacies, goes on in a subsequent part of his will to give certain other legacies after his son's death, some of money and some of Stock, to the same persons to whom he has given those specific legacies. There is nothing in the terms of bequest in which the subsequent legacies are given to make them specific. But it is contended that they must be held to be specific, because the prior legacies of Stock given to the same persons are specific. I know of no authority to justify this contention. These subsequent legacies must be held to be general legacies.

I am of opinion that the annuity of 50/. to the testator's housekeeper is comprised under the term "legacy," and, therefore, that the testator, having directed that so much of the residuary property as should consist of real estate should be applied, so far as it would extend, to the payment of the legacies, the annuity to the housekeeper must be paid out of the proceeds of the real estate.

The only other question is, what legacies are to be comprised under the words "legacies aforesaid." I think all the legacies previously given in the will must be included. Of course this direction cannot refer to the specific legacies.



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July 17, 23, 24.

*Exoneration.  
Mortgaged  
Estate.*

STONE v. PARKER.

Under a direction to pay debts, mortgage debts are included.

Therefore, where a testator directed his trustees to stand possessed of his residuary estate, "subject in the first place to the payment of my just debts, funeral and testamentary expenses," and in a subsequent part of his will empowered his trustees to "satisfy any debts owing or claimed to be owing by me or from my estate, and any liabilities to which I or my estate may be liable:"

Held, that this was a sufficient indication of intention to exonerate a mortgaged estate, and that the mortgage debt charged thereon must be paid out of the residuary estate.

THIS was a suit for the administration of the estate of *Alfred Parker*, and the principal question was, whether the testator had by his will signified an intention to charge his residuary estate with the payment of a mortgage debt of 4,000*l.*, secured on his estate called "*Salmons*," in exoneration of that estate, or whether the mortgage debt was payable by the devisee of that estate under the provisions of the act to amend the law relating to the administration of the estates of deceased persons (a).

The testator *Alfred Parker*, by his will dated the 18th of October, 1859, gave and bequeathed his freehold house and estate called "*Salmons*," with his household furniture, &c., to his trustees, their heirs, executors, administrators and assigns, upon trust to permit his wife *Georgina Jane* to occupy and enjoy the same during her life rent free, if she should so long continue a widow, and after her decease, or in her lifetime if she should marry again or refuse to occupy his said dwelling-house, he directed his trustees to sell the freehold house, furniture and effects, and stand possessed of the proceeds in trust for his daughters *Charlotte* and *Harriett*, as and when they should respectively attain the age of twenty-one, or marry under that age, and in case they should die without attaining a vested interest, then

(a) 17 & 18 Vict. c. 113.

to be held by the trustees upon and for the same or the like trusts, intents and purposes as were thereafter expressed and declared of and concerning his residuary estate ; and the testator gave, devised and bequeathed all the rest and residue of his real and personal estate (except his copyhold or customary estates) to his trustees, upon trust to sell and convert into money such parts thereof as should not consist of money ; and the testator "declared it to be his will" that his trustees or trustee for the time being should stand seised, possessed of and interested in his residuary real and personal estate and the proceeds thereof, "subject in the first place to the payment and satisfaction of my just debts, funeral and testamentary expenses," upon certain trusts expressed in his will. The testator, in a subsequent part of his will, authorized and empowered the acting trustees or executors for the time being of that his will to "pay and satisfy any debts owing or claimed to be owing by or from me or my estate, and any liabilities to which I or my estate may be or may be alleged to be subject, upon any evidence they or he shall think proper."


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STONE  
&  
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The testator died on the 19th of October, 1859.

The testator's *Salmons* estate was at the time of his death subject to a mortgage to secure 4,000*l.* and interest.

Mr. *Cracknull* appeared for the Plaintiffs, the trustees.

Mr. *Baily* and Mr. *Hobhouse*, for the testator's widow, submitted that the mortgage debt must be paid out of the general residuary estate, the testator having by his

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will signified an intention to exonerate the *Salmon's* estate from paying it; *Woolstencroft v. Woolstencroft* (a).

Mr. *Toller* and Mr. *Langworthy*, for the testator's daughters *Charlotte* and *Harriett*, who were interested in the *Salmon's* estate, supported the same view.

Mr. *Wickens*, for the infant children, the residuary legatees, submitted that the testator had only directed his ordinary debts to be paid, and that there was no indication of intention on his part to exonerate his *Salmon's* estate from the payment of the mortgage debt.

Mr. *Baily*, in reply.

The following cases were also cited:—*Davies v. Topp* (b); *Pembroke v. Friend* (c); 17 & 18 Vict. c. 113.

#### THE VICE-CHANCELLOR.

July 24.

I reserved my opinion on the question of exoneration, in order to refer to the case of *Pembroke v. Friend* (c) before the Vice-Chancellor *Wood*, but I find that case does not assist me, as in that case the testator merely directed that his just debts, &c. should be paid as soon as might be after his decease, and the Vice-Chancellor *Wood* decided that that direction did not include mortgage debts.

In the case of *Woolstencroft v. Woolstencroft*, a testator directed that all his debts, funeral and testamentary expenses should be paid by his executors out of his estate, and the Vice-Chancellor *Wood* there held that

(a) 8 W. R. 405. (c) Before V. C. *Wood*, not  
 (b) 1 Br. C. C. App. 524. reported.

that direction included mortgage debts. I think, therefore, I have authority for saying that where there is a direction for the payment of debts, mortgage debts are included.

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—  
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In this case the testator has declared his will to be, that his trustees should stand possessed of his residuary real and personal estate, and the proceeds thereof, subject, in the first place, to the payment and satisfaction of his just debts, funeral and testamentary expenses, and, in a subsequent passage, has authorized and empowered the acting trustees or executors for the time being of that his will to pay and satisfy any debts owing or claimed to be owing by or from him or his estate, and any liabilities to which he or his estate might be subject. These latter words tend to confirm me in the view which I take, on the authority of *Woolstencroft v. Woolstencroft*, that the word "debts" in the former passage includes mortgage debts.

The Act of Parliament, then, having said that, unless the testator has signified a contrary intention, the devisee of an estate shall not be entitled to have a mortgage debt charged thereon discharged out of the personalty, the question is, does the testator, by such a passage as that used in this case, signify an intention that the mortgage debt shall be paid out of the other portions of his estate. The testator has directed that the general personal estate, as well as the residuary real estate, should pay the debts; and I think this is a sufficient indication of intention to exonerate the mortgaged estate.

There being in the present case an expression of intention to exonerate the mortgaged estate, the mortgage debt must be paid out of the residuary estate.

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Proceedings  
under the  
Fraudulent  
Trustees Act

(20 & 21 Vict.  
c. 54).

Sanction of the  
Court.

The Court sanctioned proceedings under the 13th section of the 20 & 21 Vict. c. 54, upon an affidavit stating that a trustee had paid 1,409*l.* into his private bankers, had drawn out the whole, with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust funds.

## WADHAM v. RIGG.

**THIS** was an application under the 13th section of the Fraudulent Trustees Act (a) for the sanction of the Court to enable the Plaintiff to take proceedings under that act against *Daniel de la Cheriss Gourley*, one of the Defendants.

A summons had been taken out for the administration of the estate of *Samuel Rigg*, and an order made thereon on the 19th of December, 1859. On the 27th of February, 1860, an order was made for the trustees to file the administration accounts, but they had not complied with this order. An injunction had been obtained restraining the transfer of 1,000*l.*, part of the trust fund, but *Daniel de la Cheriss Gourley*, one of the trustees under the will of *Samuel Rigg*, had obtained possession of a sum of about 1,409*l.*

The 1st section of the 20 & 21 Vict. c. 54, provided, that if any person, being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, should, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or purposes, or should, with intent aforesaid, otherwise dispose of or destroy such property, or any part thereof, he should be guilty of a misdemeanor.

The 13th section of the same act provided, that no proceeding or prosecution for any offence included in

(a) 20 & 21 Vict. c. 54.

the 1st section of the act should be commenced without the sanction of her Majesty's Attorney-General, and that, where any civil proceedings should have been taken against any person to whom the first section might apply, no person who should have taken such civil proceedings should commence any prosecution under the act without the sanction of the court or judge before whom such civil proceedings should have been taken.

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Mr. *Glasse* and Mr. *Burt*, in support of the application, read an affidavit from which it appeared that the Defendant *Gourley* had paid the 1,409*l.* into his private bank, that he had drawn out the whole of that sum except 28*l.*, and that he had paid a private debt of his own, amounting to 150*l.*, by cheque, which was paid out of the 1,409*l.* It also appeared that there were no debts due from the trust estate.

The VICE-CHANCELLOR said he thought the facts stated in the affidavit were sufficient to lead to the conclusion that the Defendant *Gourley* had converted and appropriated the trust funds to his own use within the meaning of the 1st section of the Act, and granted his sanction to the application.

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NOTE.—The Plaintiffs also obtained the sanction of her Majesty's Attorney-General.

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1860.  
July 2, 27.

*Married  
Woman, Money  
advanced to.  
Necessaries.*

# JENNER v. MORRIS.

Although the Courts of Common Law do not recognize the right of a person to recover from the husband money advanced to the wife to enable her to provide herself with necessities; the Courts of Equity do not require that the person making such advances should have himself supplied the wife with necessities, but hold that he is entitled to stand in the place of the person who actually supplied such necessities, and to recover from the husband such sums of money so advanced to the wife as have been duly applied in providing her with necessities, having regard to the husband's circumstances and position in life.

**T**HIS suit was instituted by *Albert Lascelles Jenner* against *Sir John Armine Morris*, seeking to charge the life interest of *Sir J. A. Morris* in certain real estates with a judgment which he had obtained against him for a sum of 500*l.* and costs.

The Defendant by his answer admitted the validity of the judgment which had been recovered against him by the Plaintiff, but stated that the Plaintiff had married his (the Defendant's) sister, *Henrietta Julia Morris*, that in the year 1844 the Plaintiff had deserted his wife, and that he had ever since lived separate and apart from her, and had not properly maintained her; that he (the Defendant), as well before as since the said judgment, had paid large sums of money, greatly exceeding the 500*l.*, to and for the maintenance and support of the said *Henrietta Julia Jenner*, and that such monies had been actually laid out in the purchase of necessities for her; and the Defendant claimed to be entitled to the repayment of such monies from the Plaintiff, and to stand in the place of the tradesmen and others who had supplied the Plaintiff's wife with the necessities paid for by means of the monies so advanced by him; and the Defendant claimed to be allowed to set-off the same against the sum for which the judgment was recovered. The Defendant, however,

Form of inquiry as to sums of money advanced and necessities supplied to the wife.

did not distinctly set out the necessities with which the Plaintiff's wife had been supplied by means of the monies advanced by him.

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JENNER  
v.  
MORRIS.

It appeared that in the action in which the Plaintiff had obtained the judgment against the Defendant, which he sought to enforce by the present suit, the Defendant had among other pleas set up advances made by him to the Plaintiff's wife to the extent of 250*l.*, but he had not called the Plaintiff's wife as a witness, and the Plaintiff obtained judgment for the full amount claimed by him.

The question now was, whether the Defendant was entitled in equity to be allowed as against the Plaintiff's judgment the advances he had so made to and on behalf of the Plaintiff's wife.

Mr. Glasse and Mr. C. H. Smith for the Plaintiff.

Mr. Baily and Mr. Archibald Smith for the Defendant.

The following authorities were referred to: *Manby v. Scott*, and notes to that case (a); *Earle v. Peale* (b); *May v. Skey* (c); *Harris v. Lee* (d); *Marlow v. Pitfeild* (e); *Harrison v. Nettleship* (f); *Clark v. Cort* (g).

THE VICE-CHANCELLOR.

The Plaintiff has filed his bill seeking to charge the Defendant's life interest with a judgment he has recovered against the Defendant. The Defendant insists that he

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|--------------------------------------|-----------------------|
| (a) 2 Smith's Leading Cases, p. 245. | (d) 1 P. Wms. 482.    |
| (b) 1 Salk. 386.                     | (e) Ibid. 558.        |
| (c) 16 Sim. 588.                     | (f) 2 Myl. & K. 423.  |
|                                      | (g) Cr. & Phill. 154. |



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v.  
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is entitled to set off against the amount due on that judgment certain sums of money which he has advanced to the Plaintiff's wife to supply her with necessaries.

At law, although a tradesman who has supplied a married woman with necessaries, in case her husband does not maintain her, can recover as against the husband; yet the Courts of Common Law do not seem to recognize as against the husband the right of a person who has advanced monies to the wife for the purpose of enabling her to provide herself with necessaries.

But the Courts of Equity take a more enlarged view of the matter, and consider that it is not necessary that the person making the advances to the wife should have himself supplied the necessaries; and hold that he is entitled to stand in the place of the person who actually supplied such necessaries.

It appears to me, therefore, that the Defendant is entitled to the benefit of the money advances which he has made for the Plaintiff's wife for necessaries.

The Defendant has not distinctly stated the necessaries with which the Plaintiff's wife was supplied. It is impossible therefore for me to come to a conclusion as to what sums should be allowed to the Defendant; there must be an inquiry on the subject.

I must therefore declare, that the Defendant is entitled to the money advances which he has made to the Plaintiff's wife, and which have been actually expended in necessaries for her, and direct the following inquiry:—

“Whether, during the time the Plaintiff and his wife were living apart from each other, the Defendant has paid to or on account of the Plaintiff's wife, and when,

any and what sum or sums of money, for the purpose of providing her with necessaries, and whether such monies, or any and what part or parts thereof, have or has been duly applied in providing her with necessaries, having regard to the Plaintiff's circumstances and condition in life."

1860.

JENNER  
v.  
MORRIS.

August 1.

Order.  
Motion for  
Decree.

BEDWELL v. PRUDENCE.


IN this case, which was a suit to be heard on motion for decree, a motion was now made by the Plaintiff, to commit the Defendant, for not submitting to be cross-examined on his affidavits.

On the 7th May, the Defendant gave notice to read certain affidavits. On the 22nd May, the Plaintiff gave notice of cross-examination of the Defendant for the 31st. On the 29th he sent notice to the Defendant not to attend on the 31st. The time for closing evidence, assuming the evidence to be closed after the period fixed for filing affidavits, expired on the 28th June. No fresh notice of cross-examination was given within that time; but afterwards a notice was served on the Defendant, who refused to attend. The question was, whether there was any difference on this point between a motion for decree, and a suit heard in the ordinary course.

The practice as to closing evidence does not apply to motions for decree, and a notice to cross-examine, given after the seven days for filing affidavits in reply, is regular.

Mr. Glasse and Mr. Rogers, for the Plaintiff.

The practice in suits heard in the usual course, has no application to motions for decree. The orders on motions for decree do not fix any time for what is technically called closing evidence; they only fix a time for closing evidence in chief. In suits where replication

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 BEDWELL  
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is filed, an express time is given, after the closing of the evidence in chief, for cross-examination. No such time is mentioned in any Order with reference to a motion for decree. If the expiration of the seven days for filing affidavits in reply, is closing the evidence, the Defendant never could cross-examine upon those affidavits. A motion for decree is in truth, a motion for many purposes, and the Court so deals with it; and for the purpose of cross-examining, the practice on motions applies. You may cross-examine within any reasonable time. If you are unreasonable, the Court will fix a time at its discretion.

Mr. *Baily* and Mr. *Whitehorne*, for the Defendant, referred to the 26th Order of 7th August, 1852, and paragraph 8 of the 33rd of the Consolidated Orders, "no further evidence on either side shall be used upon such motion for a decree or decretal order without leave of the Court." If the Plaintiff's contention is right, where is the limit? a party may cross-examine at any indefinite time. The Orders are precise, after the seven days no further evidence shall be given; that is closing the evidence; for it is impossible to say that evidence on cross-examination is not evidence. The Orders as to causes put at issue, apply as well to motions for decree as to causes in which replication is filed. You cannot cross-examine after the time fixed by the Orders is closed.


[It was admitted on both sides that there was no authority to be found on the point.]

The VICE-CHANCELLOR.

Where issue is joined in a cause there is a certain course to be taken with regard to evidence, to this effect

there is a certain time within which both parties must file their affidavits or examine their witnesses; after that no further affidavits can be filed, nor any witness be examined in chief. On the expiration of that time, the period of what is called "closing the evidence" has arrived. Another period is fixed to commence from the "closing of the evidence," within which any persons who have made affidavits may be cross-examined. But where the Plaintiff thinks fit not to join issue in the cause, but to proceed by notice of motion for decree, he is authorized to do so under the 15th section of the Chancery Improvement Act. And on a motion for decree, the proceedings as to evidence are regulated by the 33rd of the Consolidated Orders, sect. 4. The course of proceeding thereby prescribed is totally different: the Plaintiff is to give one month's notice of his motion for decree, and must file his affidavits in support before service of such notice. Then the Defendant must file his affidavits within fourteen days after such notice; then, within seven days after that, the Plaintiff is to file his affidavits in reply; and after that there is to be no further evidence, except cross-examination. Now this course of proceeding is totally different from that in a suit in which issue is joined. There is no time fixed on a motion for decree at which the evidence is to be what is termed "closed." There is nothing said in the Orders, as to any period when cross-examination must take place, and I do not remember to have had, or to have heard of, an application in a suit to be heard on motion for decree for enlarging the time for cross-examination, which must have occurred if there was a time fixed.

If, as is contended, on a motion for decree, the period within which affidavits in reply may be filed is

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 BEDWELL  
 v.  
 PRUDENCE.

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PRUDENCE.

to be called the "closing of the evidence," then under the 21st Order this singular consequence would follow: that although there is a motion for decree pending, yet, if within four weeks after the closing of the evidence, the Plaintiff does not set his cause down and serve subpoena to hear judgment, the Defendant may move to dismiss. The total inapplicability of that practice to a motion for a decree shows that the practice of "closing evidence" cannot apply. I am of opinion, that the rules as to the time for closing evidence have no application, except in a cause in which issue is joined; and that the Defendant's objection is untenable.

[The Defendant was, therefore, ordered to attend to be cross-examined, the time being arranged between the parties.]

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*Re* NORTHUMBERLAND AND DURHAM DISTRICT BANKING COMPANY.

*Ex parte* DIXON'S EXECUTORS.

1860.  
June 30.

*Contributory.  
Winding-up  
Acts.*

**T**HIS company (unlimited) was registered under the 20 & 21 Vict. c. 49, bringing it within the Winding-up Act, 1856. The material facts were as follows:—

The company was originally formed a considerable time before the year 1844. In that year Mr. *Dixon* agreed to purchase from various parties shares in the company, and took transfers from the vendors. He received dividends during his life. He died early in 1857. Before his death the company was registered and brought itself within the Winding-up Act, 1856.

In March, 1857, *Dixon's* executors sold and transferred his shares to other persons, and the directors transferred his shares from his name into the names of the assignees. Mr. *Dixon's* name was never returned and registered as a shareholder on the list pursuant to the terms of the Winding-up Act, 1856, either before or after the registration of the company under the Act of 1857.

The question was, whether his executors were contributories in respect of his estate, and that turned on the 19th, the 65th, the 95th and the 108th sections of the Winding-up Act, 1856.

Mr. *Giffard* and Mr. *Field*, for the Official Liquidator,  
Vol. I—2.

A person in 1844 bought shares in a banking company, and had them transferred to him. The company afterwards registered under the 20 & 21 Vict. c. 49, so as to come within the Winding-up Act, 1856. He was never entered on the list of shareholders under that act, but had received dividends; and after his death his executors received dividends, and then sold the shares. Held, that as he would have been a contributory under the old acts, so, following *Luard's Case*, his executors were now contributories.

1860.

~  
*Re*

NORTHUMBER-  
 LAND, & C.  
 BANKING CO.  
*Exp. DIXON'S*  
 EXECUTORS.

moved to put Mr. *Dixon's* executors as executors on the list of contributories. They cited *Luard's Case* (a).

Mr. *Glasse* and Mr. *H. Stevens, contrá*, referred to the 62nd, 63rd, 65th and 108th sections of the Act of 1856. Mr. *Dixon* never was returned as a shareholder and never was a shareholder under the Act of 1856. A man cannot be held to be a shareholder under this act unless he has, not only accepted shares, but has been registered on the list as a shareholder. When this company was registered these things had not been done, and he was not therefore a shareholder. It is said that, according to *Luard's Case*, the principle of proving a contributory is the principle of the old acts, and applies to a company such as this. But, even assuming that to be so, there are other grounds for holding that Mr. *Dixon* was not liable. Under the old law, to put a person on the list as a contributory, you must show that at the time when he ceased to be a shareholder there was a debt of the company existing. Now, in the deed of settlement of this company, the 44th clause makes accounts confirmed binding as between shareholders. Before Mr. *Dixon's* death a balance-sheet was made out showing a prosperous state of the company, and afterwards that balance-sheet was approved; that is conclusive as between the shareholders, that at the time Mr. *Dixon's* death there were no debts. Supposing this company had afterwards been wound up, Mr. *Dixon* or his executors could not, under the old act, have been called on to contribute; and they cannot therefore now, assuming even that *Luard's Case* throws us back on the old principle; *Holme's Case* (b).

(a) 6 Jur. N. S. 331.

(b) 2 De G., M. & G. 113.

No reply was called for.

The VICE-CHANCELLOR.

I think I am bound by the decision of the Lords Justices in *Luard's Case*. That case has decided the principle. As to the facts there is no dispute.—[His Honor referred to the facts already stated.]

1860.

*Re*

NORTHUMBER-  
LAND, &c.  
BANKING CO.  
*Exp. DIXON'S*  
EXECUTORS.

This company was registered under the Act of 1857, and so brought within the Act of 1856, and the contention is, that the Act of 1856 differs from the Act of 1848. The 108th section of the Act of 1856 says, that the Act of 1848 shall not apply to companies coming under the Act of 1856. When *Luard's Case* was before me the same arguments were urged as are now used. When pressed with the 95th clause, I thought that clause was meant only to apply to matters of procedure and did not affect the principle of winding up, having regard to the 108th section; but the Lords Justices held that, notwithstanding the 108th section, still under the 95th section the old principle of winding up must be applied where the Act of 1856 does not establish a new principle, and to that decision of course I bow. Then, do I find in this act anything which puts the principle on a different footing? It certainly appeared to me on the hearing of *Luard's Case* that the framers of the Act of 1856 meant to establish these two principles—first, that nobody could be a shareholder unless he had accepted shares and unless his name was entered in the register (sect. 65); and secondly, that no person could be a contributory other than an existing or former shareholder, although, by some strange oversight, the framers of the act had omitted the clause they had evidently intended to introduce, specifying what share-



1860.

Re

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holders were to be deemed contributories and in what order and manner.

The Lords Justices, however, having taken this view, that the principle of the old acts is not put aside, and it being perfectly clear that under the old acts *Mr. Dixon* would have been liable to be put on the list, I am bound by *Luard's Case*, and *Mr. Dixon's* executors must be put upon the list of contributories.

July 6.

Will. Gift of  
Personalty to  
"Heirs."

In re ROOTES.

Where a testa-  
tor bequeathed  
personalty  
"equally be-  
tween the heirs  
of my late un-  
cle *William*  
*Neve*, *John Neve*  
and my aunt  
*Penelope Fran-*  
*cis*," all three of  
whom were  
dead at the  
date of the will:

Held, that  
the heirs at law  
of those three  
persons living  
at the death of  
the testator,  
and not their  
next of kin,  
were entitled.

The decision  
in *Evans v. Salt*  
(6 Beav. 267)  
disapproved of.

**THOMAS ROOTES**, by his will dated the 29th of August, 1846, after giving a life interest to his wife *Sarah Rootes* in all his effects, whatever they might consist of, and giving various legacies to be paid on his wife's decease, proceeded as follows:—"And after my loving wife's decease, whatever property may be left, equally between the heirs of my late uncle, *Mr. William Neve*, late of *Crouchurst*; *Mr. John Neve*, late of *Wittersham*, farrier, and my aunt *Penelope Francis*, late of *Beckley*," and the testator appointed his wife *Sarah Rootes* and *Mr. Edward Lord* joint executors of his will.

The testator died on the 12th of September, 1846, and his will was proved by the executors in March, 1847.

*Sarah Rootes* died in August, 1859, and in January, 1860, *Edward Lord*, the surviving executor, paid

560*l.* 13*s.* 10*d.*, being the clear residuary personal estate of the testator after payment of all his debts and legacies, into Court under the Trustee Relief Act.

1860.  
In re ROOTES.

*William Neve, John Neve* and *Penelope Francis* were all dead at the date of the will.

The present petition was presented by the heirs of *William Neve, John Neve* and *Penelope Francis*, claiming to be entitled to the fund. The petition had stood over in order that the next of kin of *William Neve, John Neve* and *Penelope Francis* might be served.

Mr. *Baily* and Mr. *Sûrrage* for the Petitioners contended that, although the gift consisted of personalty, the testator intended to designate the "heirs" and not the next of kin of *William Neve, John Neve* and *Penelope Francis*. They cited *Mounsey v. Blumire* (a); *Southgate v. Clinch* (b); *De Beauvoir v. De Beauvoir* (c).

Mr. *Glasse* appeared for the trustee.

Mr. *Hobhouse*, for persons representing the next of kin, submitted that the gift being of personalty the word "heirs" must be read as meaning the next of kin; *Evans v. Salt* (d); *Re Gamboa's Trusts* (e).

THE VICE-CHANCELLOR.

The first question is, whether the word "heirs" ought to apply to the heirs of *William Neve*, the first person named only, so that the gift would be "to the heirs of

(a) 4 Russ. 384.

(b) 27 L. J., Ch. 651.

(c) 2 H. of L. Cas. 557;

*S. C.* 2 Jarm. on Wills, 65.

(d) 6 Beav. 266.

(e) 4 K. & J. 756.

1860.

*In re* ROOTES.

*William Neve* and to *John Neve* and to *Penelope Francis*." Now it appears that not only *William Neve*, but *John Neve* and *Penelope Francis* also, were dead at the date of the will, and there is no reason to suppose that this fact was unknown to the testator. Therefore the word "heirs" must be applied to the heirs of all three, and not to the heirs of *William Neve* alone.

Then comes the question, what is meant by the word "heirs" where it is used in a simple gift of personalty, as in the case of a gift to the heirs of *A*. No doubt that expression, in its primary acceptation, means the person who is heir-at-law to *A*.; and the first principle of construction is to give to the words used their ordinary and primary sense and meaning, unless from the context it is apparent that they are used in some other sense. In such a case as the present the only ground upon which it can be contended that the word "heirs" was not used in its primary sense is, that the subject of the gift is personalty. But there is no reason why a testator should not, if he chooses, give a sum of money to the heir-at-law of a deceased person as well as to his next of kin. If a testator gives a sum of money by immediate gift to his own heir, he means to his heir proper; and if there is the simple case of an immediate gift to the heir of a deceased person, the heir proper of that person will take. In the present case the gift is to the heirs of three persons, *A*., *B*. and *C*., which means the heirs of *A*., of *B*. and of *C*. respectively, and the word "heirs" in the plural is appropriately used to express the heir of *A*., the heir of *B*. and the heir of *C*.

With regard to the case of *Evans v. Salt* (a), if that

(a) 6 Beav. 266.

were the only case upon the point there would be some difficulty in distinguishing this case from it. But I do not consider that is a decision which ought to govern subsequent cases, inasmuch as the report gives only the decision, and not one word as to the reasons upon which it is founded.

1860.  
In re ROOTES.

There is in this will no sufficient indication that the testator has used the word "heirs" in any different sense than the ordinary one, and therefore the heirs-at-law proper of *William Neve, John Neve and Penelope Francis* respectively living at the death of the testator are entitled. The next of kin must have their costs out of the estate.

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WRIGHT v. VERNON.

THIS case came on upon two petitions, which were presented under the following circumstances:—

By a decree made in the suit of *Wright v. Vernon*, the *Samwell* estates were decreed to belong, one-third to *Mrs. English*, a Defendant in the suit, one-third to *Mr. Wright*, the Plaintiff in the suit, and the remaining third to a *Mr. Woodford*, and commissioners were appointed to make a partition of the estates.

*Mrs. English*, who was entitled to a third portion of on something the commissioners have done, or on some dealing between the tenants in common. The Court has no jurisdiction to interfere upon the application of a stranger, or of a tenant in common, founded on dealings between one of the tenants in common and such stranger.

August 2.  
Partition  
Commissioners,  
Directions to.

The Court will interfere and direct partition commissioners, in the exercise of their discretion, in case of miscarriage by them; but an application to the Court to give such directions must be made by one of the tenants in common; and be founded

1860.  
WRIGHT  
v.  
VERNON.

the estates, had agreed to sell to a Mr. *Manning* a certain portion of the *Samwell* estates which had been previously allotted to her under a partition which had been made in the suit of *Fairfax v. Drought*, but which partition had been declared inoperative. Mrs. *English* now refused to carry out her contract with Mr. *Manning*.

The first petition was presented by Mr. *Wright*, the Plaintiff in the suit, who was entitled to one-third of the *Samwell* estates, stating that by reason of the agreement entered into with Mr. *Manning* the partition could not be carried out without some further order of the Court; and that if the partition of the estates so agreed to be sold to Mr. *Manning* were allotted to the Petitioner, he could not deal with the property till it had been decided whether the contract entered into with Mr. *Manning* was binding upon him. The Petitioner therefore prayed that the portion of the estates which Mrs. *English* had agreed to sell to Mr. *Manning* might be sold, that the purchase-money might be paid into Court, and that the commissioners might be absolved from making a partition of such portion; or, in the alternative, that the commissioners might be directed in making the partition to allot such portion of the *Samwell* estates to Mrs. *English*, so that Mrs. *English* might be enabled to carry out her contract with Mr. *Manning*.

The other petition was presented by Mr. *Manning*, to whom Mrs. *English* had agreed to sell part of the estates in question (but who was not a party to the suit of *Wright v. Vernon*), stating that it would be unjust and unfair towards him that the estates agreed to be sold to him should be allotted to any other person than to

Mrs. *English*, inasmuch as thereby he might be prejudiced in obtaining the performance of his agreement, and that litigation would arise; that he had been in possession of the portion of the estates in question, and had expended 200*l.* in improvements on the property, and he prayed that such portion of the estates might be allotted to Mrs. *English*.

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 WRIGHT  
 v.  
 VERNON.

The portion of the property which Mrs. *English* had agreed to sell to Mr. *Manning* consisted of some of the most valuable parts of the property, as it included some water meadows.

Mr. *Glasse* and Mr. *Nalder*, in support of Mr. *Wright's* petition, and Mr. *Bovill*, in support of Mr. *Manning's* petition, submitted that the Court, upon a partition, would have regard not merely to the legal rights of the tenants in common, but also to the equitable rights of all parties actually interested in the estate; and therefore that the Court would give such directions to the commissioners as would enable Mr. *Manning* to obtain the benefit of his contract with Mrs. *English*. They cited *Story v. Johnson* (a).

Mr. *Anderson* and Mr. *Surrage*, for Mr. *Woodford* (one of the tenants in common), supported both petitions.

Mr. *Baily* and Mr. *H. Stevens* for Mrs. *English*, opposed both petitions, and submitted that the Court had no jurisdiction to interfere with the Commissioners, whose duty and discretion, when once appointed, were distinct from and independent of the Court. The Commissioners were bound to make the partition among the

(a) 2 Y. & Coll. Ex. 586.

1860.  
WRIGHT  
v.  
VEENON.

tenants in common, and without having regard to any external circumstances. The agreement made by Mrs. *English* with Mr. *Manning* was *ultra vires*, it not being competent to one tenant in common to create a particular interest in the property either for herself or for any third person to the detriment of the other tenants in common. Mr. *Manning* being neither a party to the suit nor one of the tenants in common, the Court at all events could not entertain his petition.

Mr. *Nalder* in reply.

The VICE-CHANCELLOR.

It is the duty of Partition Commissioners in making a partition to allot the property in such a way as that, if any one of the tenants in common desires for good and sufficient reasons to have a particular portion of the property allotted to him, they shall make the allotment of that portion to him accordingly, provided it is a matter of indifference to the other tenants in common; and if the Commissioners should miscarry in the performance of their duty, this Court will interfere, even after they have made the partition.

The first object of Mr. *Wright's* petition is, that the portion in question, instead of being included in the partition, should be sold, and the money applied to certain specific purposes.

The right of any person being a tenant in common to apply to the Court to regulate the discretion of Partition Commissioners, or to set aside anything done by them, must be founded either on some miscarriage of the Commissioners or on some contract or dealing between

the tenants in common. Mr. *Wright's* application for a sale is not founded on any ground of that kind.

1860.  
WRIGHT  
v.  
VERNON.

The second part of the prayer of Mr. *Wright's* petition is founded on this :—he says, there is a third person, Mr. *Manning*, no party to the suit or to the partition, to whom justice requires that a particular portion of the property should be allotted to Mrs. *English*, one of the three tenants in common. The question then for me to consider is, whether a tenant in common has any right to a direction from the Court, that a particular portion of the property shall be allotted to one of the tenants in common, in order that such tenant in common may be obliged, not by any party to or by any proceeding in this suit, but by a stranger, and by means of some other suit, to do justice to that stranger. I apprehend the Court has no jurisdiction to interfere upon such a ground. I must, therefore, dismiss Mr. *Wright's* petition with costs.

With regard to Mr. *Manning's* petition, Mr. *Manning* is not a party to the suit. It appears that the water meadows have been held separately, and that Mrs. *English* agreed to sell a portion of the estates, including the water meadows, to Mr. *Manning*, subject to the approbation of the Court, which she never obtained. Mr. *Manning* now comes and asks the Court to direct the Commissioners to allot to Mrs. *English* the portion of the property consisting of the water meadows, which she has agreed to sell to him. This is opposed by one of the tenants in common, who insists that the water meadows are the best portions of the property, and that the partition should not be interfered with. Can a stranger interfere in this way? He says, it is true I am not a tenant in common, but I come and ask the Court to make such a partition among the tenants in common



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v.

VERNON.

as will give to one of them a particular portion of the property, the result of which will be that I shall be in a position to institute proceedings against her and enforce my contract. The Court will not, upon the application of a person who is a stranger to a partition, interfere so as to direct the Commissioners to allot particular portions of the property to a particular person.

I must, therefore, dismiss Mr. *Manning's* petition, with costs as against Mr. *Wright* and Mr. *Woodford*, but without costs as against Mrs. *English*.

1858.

July 27.

*Will. Residuary  
devise of Realty.  
Specific Devise.*

## DADY v. HARTRIDGE.

A residuary devise of real estate since the Wills Act (1 Vict. c. 26) is not specific.

Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of the debts, in priority to the real estates specifically devised.

THIS suit was instituted by *Harriett Dady* for the construction of the will of *Elizabeth Horton*, and the question was as to the manner in which the different portions of the testatrix's real estate should contribute to the payment of her debts, the personal estate being insufficient.

The testatrix, by her will dated the 9th July, 1856, after directing her executors to pay her debts and funeral expenses and making certain specific devises of freehold and leasehold estates, devised certain ground-rents to the Plaintiff *Harriet Dady*; and after giving certain specific legacies of personal estate and pecuniary legacies, as to all the rest, residue and remainder of her property of what kind soever, she gave and bequeathed

the same and every part thereof unto her friend Mrs. Cove to and for her own use; and the testatrix appointed *William Wilmot* and *William Hartridge* executors of her will.

1858.  
  
 DADY  
 v.  
 HARTRIDGE.

The testatrix died on the 18th of July, 1856, leaving *George James Dady* her heir-at-law.

Certain parts of the real estate, specifically devised, lapsed through the death of the devisee in the testatrix's lifetime.

The personal estate not specifically bequeathed being insufficient to pay the debts and funeral and testamentary expenses, the executors entered into possession of the testatrix's real and personal estate. Under these circumstances the Plaintiff filed his bill as a specific legatee, praying that the debts of the testatrix might be paid out of the rents come to the hands of the residuary legatee.

Mr. *Bazalgette* and Mr. *C. Browne*, for the Plaintiff and the other specific legatees, contended, that since the Wills Act (a), a residuary devise of real estate was not specific, and therefore that the deficiency of the personal estate must be made up out of the residuary real estate before resorting to the estates specifically devised; or at all events that the estates specifically devised and the residuary real estate must contribute rateably to the payment of the debts.

Mr. *C. Swanston* appeared for the executors.

Mr. *Lee* and Mr. *W. Morris*, for the residuary devisee,

(a) 1 Vict. c. 26.

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HARTRIDGE.

submitted that, the gift of the residue being specific, the estates specifically devised and the residue must contribute rateably.

The following cases were cited:—*Long v. Short* (a); *Hanby v. Roberts* (b); *Haslewood v. Pope* (c); *Silk v. Prime* (d); *Bench v. Byles* (e); *Cole v. Turner* (f); *Mirehouse v. Scaife* (g); *Withers v. Kennedy* (h); *Spong v. Spong* (i); *Joy v. Campbell* (k); *Tombs v. Rock* (l); *Jones v. Price* (m); *Gervis v. Gervis* (n); *Dowling v. Hudson* (o); *Emuss v. Smith* (p); *Francis v. Clemow* (q); *Cogswell v. Armstrong* (r); *Wheeler v. Howell* (s); *Eddels v. Johnson* (t).

#### THE VICE-CHANCELLOR.

The question is, whether a residuary devise of real estate is, since the Wills Act, specific or residuary.

Before that act real estate, of which a testator was not seised at the time of making his will, would not pass by such will. If a testator gave a particular real estate to *A.*, and gave the rest of his real estate to *B.*, inasmuch as he could only devise what he had at the time of making his will, although he used words importing residue, he was in fact devising the specific estates

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|-------------------------|---------------------------|
| (a) 1 P. Wms. 403.      | (l) 2 Coll. 490.          |
| (b) Ambl. 127.          | (m) 11 Sim. 557.          |
| (c) 3 P. Wms. 322.      | (n) 14 Sim. 654.          |
| (d) 1 Dick. 384; S. C., | (o) 17 Beav. 248.         |
| 1 Bro. C. C. 138, n.    | (p) 2 De G. & Sm. 734.    |
| (e) 4 Madd. 187.        | (q) 1 Kay, 435.           |
| (f) 4 Russ. 376.        | (r) 2 K. & Joh. 227.      |
| (g) 2 My. & Cr. 695.    | (s) 3 K. & Joh. 198.      |
| (h) 2 My. & K. 607.     | (t) 6 W. R. 401; S. C., 1 |
| (i) 3 Bl. N. S. 84.     | Giff. 22.                 |
| (k) Ibid. 111, n.       |                           |

which he was then seised of and nothing else. It was the same thing as if he had devised those particular estates by name. If a testator gives to *A.* a certain amount of £3 per Cents., part of a larger sum of £3 per Cents. then standing in his name, and then gives to *B.* all the residue of the £3 per Cents. then standing in his name, although he uses words importing residue, still the gift to *B.* is a specific gift, because it will pass only that particular stock which he has at the date of the will. It is a specific bequest to *B.* of all the £3 per Cent. Stock then standing in the testator's name, except that portion of it which is bequeathed to *A.*; and a devise of the residue of the testator's real estate under the old law, before the Wills Act, stood precisely on the same footing as a gift of "all the residue of the £3 per Cents. now standing in my name." It was a devise to *B.* of the particular real estates which the testator had at the date of the will, except that estate which is devised to *A.* Such a devise was held specific and not residuary, although given by words importing residue. It would not have included after-acquired realty, nor would it have included a lapsed devise of any particular portion of the real estate, and using the word residue would not affect the question. So, if there was a specific devise of realty to *A.*, and a devise of the residue of the realty to *B.*, *B.* was as much a specific devisee as *A.*, and specialty debts to which the real estates were liable would be a charge upon both *pro rata*, and the word residue would not prevent the liability. And yet, even under the old law, there were cases in which a testator having devised a particular real estate to *A.*, and the residue of his realty to *B.*, the Courts, although holding that to be a specific devise, yet recognized the distinction between the two gifts in respect to what was assumed to be the testator's intention so far as this, that

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if he charged his realty with debts and legacies they would throw that charge, not on the specifically devised estates and on the residue, but on the residue alone, because the intention was assumed to be that *A.* should have the particular estate which was devised to him free from the charge, and that the residue devised to *B.* should be alone liable to the debts and legacies.

The Wills Act entirely altered the nature of a residuary devise of real estate. First, the 24th section enacts, that in the absence of a contrary intention the will shall be construed to speak and take effect as if executed immediately before the death of the testator. The effect of this section is that a residuary devise will include all the real estate acquired at any time after the date of the will, but it would not necessarily include a lapsed devise of realty specifically given. Therefore, in order to make a residuary devise of real estate, like a residuary bequest of personalty, include everything not otherwise effectually disposed of, the 25th section applied to lapsed gifts and those which were void as being contrary to law, such as gifts to charities, and enacted that they should all be included in a residuary devise. Thus, in every respect in which under the old law a residuary devise of real estate differed from a residuary bequest of personalty, that difference was done away with. The act has not, indeed, declared in express terms that a residuary devise of real estate should not be considered specific, but I think it has said so in substance.

What, then, is the effect with respect to the liability of the different portions of the real estates to the payment of debts? If a residuary devise is no longer a specific devise of each particular portion of real estate which may be comprised therein, but merely a general

devise of all such real estate (if any) as may happen not to be otherwise effectually disposed of by the will, it would seem to be most in accordance with the testator's intention to hold that the real estates comprised in the residuary devise are liable to the payment of the debts in exoneration of the estates specifically devised, in order that the specific devisees may have that benefit which the testator clearly intended for them, upon the same principle upon which the residuary personal estate is liable to the debts in exoneration of specific legacies. Indeed, if this were not so, the Wills Act would have the effect in some cases of making specifically devised estates contribute to the payment of debts *pari passu* with other estates which under the old law would have been liable to the debts in exoneration of the specifically devised estates; for under the old law an estate comprised in a devise which lapsed descended to the heir, and like all other descended estate was liable to the debts in exoneration of the other devised estate. But, by the Wills Act, the estate comprised in the lapsed devise, instead of descending to the heir, falls into the residuary devise; and if the residuary devise is to be considered to be a specific devise, then the estate comprised in the lapsed devise becomes specifically devised to the residuary devisee, and therefore it would no longer be liable to debts in exoneration of the other specifically devised estates, as it was before the Wills Act, but would only be liable to contribute to the debts *pari passu* with the other specifically devised estates. This could hardly have been the intention of the legislature.

There must be a general declaration, that the residuary property is primarily liable to the debts, with a direction for a sale, and a declaration that the residuary devise of the estate embraced the lapsed devise to Mr. *Young*.

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A testatrix being possessed of three estates, by her will devised one of those estates by name, and all other her lands and tenements whatsoever and wheresoever, and, by a codicil executed on the same day, specifically devised her two other estates, to different persons.

Held, that the will and codicil were executed to carry out one intention, that the will must be read as if it contained an express exception of the two estates devised by the codicil, that the estate devised by name

in the will was specifically devised, and that the devise in the will was residuary so far only as related to after-acquired property; and therefore that all three estates must contribute rateably to the payment of debts, the personal estate being insufficient.

A residuary devise of real estate, since the Wills Act (1 Vict. c. 26), is not specific.

THIS was an administration suit. The question was as to the manner in which the real estates devised by the will and codicil of the testatrix should contribute to the payment of her debts, the personal estate being insufficient.

*Jane Thomas*, being entitled to real estates in the counties of *Anglesey*, *Carnarvon* and *Denbigh*, by her will dated the 21st of July, 1851, devised unto *John Browning Edwards*, *John William Ellis*, *John Morgan* and *Frederick Long Barnwell*, whom she appointed trustees of her will, all her lands, tenements and real estate at *Cemmaes*, *Llanbadrig* and *Amlwch* or elsewhere, in the county of *Anglesey*, and all other lands, tenements and real estate whatsoever and wheresoever which she might have at the time of her decease or had power to dispose of by that her will, upon trust for *John Browning Edwards* for life, and after his death in trust for his children in manner therein mentioned, and if *John Browning Edwards* should die without issue, she directed that her trustees should stand seised of her said lands, tenements and hereditaments and real estates for the term of ten years from the day of his decease, and manage the same and receive the rents, issues and

profits, and by accumulation thereof or otherwise pay off and discharge the mortgages, charges or incumbrances on the said estates or so much thereof as such rents, issues and profits might be sufficient to satisfy, and at the expiration of such ten years, or so soon as all such mortgages, charges or incumbrances should be satisfied, if the same should be sooner discharged, then she directed that the trustees should stand seised of her said real estates, upon trust for the second son of her late nephew *Rice Robert Huges*, and the heirs of his body, if such second son or any of his issue should not previously to the expiration of the said term of ten years have become entitled to the messuages, lands, tenements and hereditaments of *Trevor Hall*, in *Denbighshire*, belonging to her late mother *Margaret Thomas* under her will; but if such second son or any of his issue should have become so entitled, then she directed that her trustees should stand seised of her said real estates upon similar trusts in favor of the third son of her said late nephew *Rice Robert Huges*, and the heirs of his body, and in case of the said second and third sons both having become entitled to the said messuages and lands of *Trevor Hall* as aforesaid, previously to the expiration of the said term, then she directed that her trustees should convey the said real estates to such uses as should be then subsisting of and in the messuages, lands and tenements of her late father and brother at *Coedhelen*, in the county of *Carnarvon*; and the said testatrix directed, that if the second son of the said *Rice Robert Huges*, or any of the issue of such second son, should become entitled to an estate tail in possession in equity under the trusts aforesaid in her said real estates, then, on failure of issue of such second son, the same should go and belong to the third son of the said *Rice Robert Huges*, and on failure of issue of

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both of them should be settled to the aforesaid subsisting uses of the said estates at *Coedhelen*; and the said testatrix further directed, that if the third son of *Rice Robert Hughes*, or any of the issue of such third son, should become entitled to an estate tail in possession in equity under the trusts aforesaid in her said real estates (without the second son or any of his issue ever having become entitled to any estate tail therein), then on failure of issue of such third son the same estates should be settled to the aforesaid subsisting uses of the *Coedhelen* estates; and the said testatrix declared that it should be lawful for her trustees or trustee at any time or times, if they or he should find it necessary or expedient for the purpose of discharging any of the mortgages, debts or incumbrances aforesaid, to sell or mortgage her real estates or any parts or part thereof; and the said testatrix, after bequeathing certain pecuniary bequests and legacies amounting to 400*l.*, charged such bequests and any other pecuniary legacies which she might give by any codicil thereto upon her real estate, in discharge of her personal property thereby or by any codicil thereto specifically bequeathed. The said will then contained the following clause:—"And I bequeath to the said *John Browning Edwards* all my plate, furniture, carriages, horses, apparel and other effects whatsoever, except monies or securities for money, for his own use and benefit, and expressly and absolutely discharged from payment of my debts, funeral or testamentary expenses, which I charge upon my real estates in exoneration of the bequest hereby made to him, in case any other property shall be insufficient to discharge the same." And the said testatrix appointed the said *John Browning Edwards* to be her executor.

*Jane Thomas*, by a codicil to her will bearing the same date as her will, gave and devised all the land and estate of her said late sister *Trevor Thomas*, called *Morfa*, or by any other name, lying and situate in the parish of *Llandwrog*, in the county of *Carnarvon*, to *Mary Lloyd* for her life, and after her decease to all her children who should then be living or should have died leaving issue, and their heirs, to be divided equally between them and the issue of any deceased child, to take his or her share; and she gave and devised all the other lands and tenements of her said late sister to her nephew *John Browning Edwards* for his life, in the same manner and with the same powers she had given to him by her will as to her estates in *Anglesey*; and subject to his life estate, she gave and devised such of her said sister's lands and tenements as were situate in the parish of *Llanbeblig*, in the county of *Carnarvon* or in the town of *Carnarvon*, to the son of her late nephew *Rice Robert Hughes* who should succeed to the *Coedhelen* estate and his heirs, so as to be held and go along therewith; and the testatrix gave and devised such of the lands and tenements of her said late sister as were situate in the county of *Denbigh*, subject to the life estate of the said *John Browning Edwards*, to such son of the said *Rice Robert Hughes* as should succeed to the estate of *Trevor Hall*, so as to be held and go along therewith; but if at the time of the decease of the said *John Browning Edwards* either the said *Coedhelen* estate or the said *Trevor Hall* estate should not become vested in possession in a son of the said *Rice Robert Hughes*, then she gave the lands thereby devised to go with such estate to his widow *Charlotte Hughes* (one of the Defendants), for her own use and benefit, until one of his sons became entitled in possession to such estate.

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The testatrix, *Jane Thomas*, died on the 26th August, 1856, and letters of administration, with her said will and codicil annexed, were granted to the Defendant *Pennant Iremonger*.

*Jane Thomas* left *W. R. Hugues* and *Pennant Iremonger*, two of the Defendants, her co-heirs at law.

By an indenture dated the 17th of September, 1853, *Jane Thomas* mortgaged the *Carnarvon* estates to the Plaintiff *Frederick Lowry Barnwell*, to secure 2,000*l*. The Plaintiff also held a promissory note from *Jane Thomas*, dated in 1801, for the sum of 385*l*. 18*s*. 8*d*.

The personal estate being insufficient to pay the testatrix's debts the Plaintiff instituted this suit on behalf of himself and the other creditors, for the administration of the testatrix's real and personal estate.

Mr. *Baily* and Mr. *B. L. Chapman* appeared for the Plaintiff.

Mr. *Keane* appeared for *Pennant Iremonger*.

Mr. *Glasse* and Mr. *Speed*, for the devisees of the *Carnarvon* estate, submitted that the devise in the will, being a devise of the testatrix's lands, tenements and real estate in the county of *Anglesey*, and all other lands, tenements and real estate whatsoever and wheresoever, was a residuary and not a specific devise; and therefore that the *Anglesey* estate was liable in the first place, in exoneration of the estates devised by the codicil, to the payment of debts and incumbrances.

Mr. *E. F. Smith* appeared for the devisees of the *Denbigh* estate in the same interest.

Mr. *T. H. Hall*, for the devisees of the *Anglesey* estate, submitted that the devise of the *Anglesey* estate contained in the will, though coupled with a residuary devise of real estate, was not the less specific; and therefore that all the three estates must contribute rateably to the payment of debts and incumbrances.

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*Eddels v. Johnson* (a); *Dady v. Hartridge* (b); *Pearmain v. Twiss* (c); *Harris v. Watkins* (d); *Graves v. Graves* (e), and *Spong v. Spong* (f), were cited in the course of the argument.

The VICE-CHANCELLOR.

The questions in this case are, first, in what manner the real estates of the testatrix are to contribute to the debts, the personal estate being insufficient; and secondly, whether the real estates or any of them are liable to the payment of certain pecuniary legacies.

The testatrix at the time of her death was seised in fee of three estates, one in *Anglesey*, another in *Carnarvon* and the third in *Denbigh*. By the will the legal estate in the property thereby devised is given to the trustees in fee, and all the limitations in the will are of equitable estates. The words of that devise in the will are sufficient in themselves to comprise all the three estates she then had and also all the real estates (if any) which she might afterwards acquire and die seised of. She did not, however, in fact, afterwards acquire any other real estate. But, notwithstanding the generality of the terms of this devise, if we find in the will and

- (a) 1 Giff. 22.
- (b) Ante, p. 236.
- (c) 2 Giff. 137.

- (d) Kay, 438.
- (e) 8 Sim. 43.
- (f) 3 Bligh, N. S. 84.

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codicil a clear indication of an intention, to use the language in a restricted sense, of course that intention must prevail. The will does not contain a word indicating any such intention. Do we find any such indication of intention in the codicil?

Now it is to be observed that the codicil was executed on the same day as the will. They are both dated the 21st of July, 1851, and both attested by the same witnesses. This is not the case of a testatrix making a will disposing of her property according to her then intention, and some time afterwards changing that intention, and for the purpose of effecting such change of intention making a codicil revoking or altering any of the dispositions which she had made by her previous will; there is not a word in the codicil indicating that she was revoking or altering anything which she had done by the will or that she conceived that she had already by her will disposed of all her real estates. Nor is this the case of a testatrix who had made her will, immediately afterwards adding a codicil for the purpose of giving an additional legacy or two which she had forgotten, or supplying something which had been inadvertently omitted or which was erroneous in her will. It is impossible to read this will and codicil without seeing that they were made simultaneously to effect one single intention which she had formed and matured previously to her executing either of them, which intention embraced all the dispositions to be found both in the will and in the codicil and which intention once matured underwent no change whatever. At the moment when she executed the will she had already resolved upon the dispositions of property which we find in the codicil, just as completely and definitively as she had resolved on those which we find in the will, and as soon as she

had effected one portion of her then intention by executing her will without the intervention of a single day (probably not even of many minutes) she effected the remaining portion of that intention by executing her codicil.

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The codicil disposes exclusively and completely of the estates in *Carnarvon* and *Denbigh* which had belonged to her sister, and though a short instrument, it deals with those estates carefully and elaborately, dividing them into different portions and devising the portions so as ultimately to go in different channels.

On examining the dispositions made by the will and codicil respectively it is impossible to suppose that those contained in the codicil were intended to be tacked on to or to be made by way of correction or alteration of any of the limitations contained in the will. It is to be observed that the codicil contains no words of revocation, that a life estate is given to *John Browning Edwards*, but that there is no limitation to his sons and daughters as in the will; that there is a reference in the codicil to the devise in the will of a life estate to *John Browning Edwards* with respect to the *Anglesey* estate; that the limitations in the will are all equitable, while in the codicil there is no reference to a trust, but the legal estate is devised to the beneficiaries; and that the codicil contains no term of ten years for the purpose of paying off mortgages by accumulations of rents similar to that contained in the will.

I arrive without any doubt at the conclusion that the testatrix, before executing the will, had determined to dispose of the *Carnarvon* and *Denbigh* estates which had belonged to her sister in the manner appearing in

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the codicil by a separate and distinct testamentary instrument from that by which she disposed of her other estate, and that for that purpose the codicil was already prepared for execution at the time when she executed her will, and that she did not intend to dispose of the *Carnarvon* and *Denbigh* estates by the will, but only by the codicil. In truth, the language of the devise in the will, though I admit that it is sufficiently large to have comprised every real estate she then had or might afterwards acquire, is such as to be not inappropriate on the supposition that such was her intention.—[His Honor here read the devise in the will.]

Now, first, it may be observed that of the three estates of which the testatrix was then seised in fee in possession she only mentions the *Anglesey* estate, omitting the *Carnarvon* and *Denbigh* estates. If she meant by that devise to pass the *Carnarvon* and *Denbigh* estates there does not seem any reason why she did not mention them as well as the *Anglesey* estate. She certainly did not select that one of the three for mention as being her home or place of residence—it was not so—for at the commencement both of the will and codicil she describes herself as of *Coedhelen*, in the county of *Carnarvon*, and that county and not *Anglesey* was the county in which she had her home, her *domicile* (using that word in the popular sense). But further, the words which follow seem to point more to future than to present property. Those words import futurity and uncertainty.

The devise in the will, with the light thrown upon it by the contemporaneous codicil, must be read as if there was an express exception of the *Carnarvon* and *Denbigh* estates, and must be held to comprise only the *Anglesey* estate and such estates, if any, as she might afterwards

acquire. If the devise of the *Carnarvon* and *Denbigh* estates (instead of being contained in a codicil) had been found in the will itself, I apprehend there could be no doubt that by the first devise she did not mean to pass the *Carnarvon* and *Denbigh* estates; and as the codicil was made and executed contemporaneously with the will, for the reasons I have stated I arrive at the same conclusion as if they had been devised by the will.

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There is no gift in the will or codicil of the general personal estate; the only gifts of personalty are the specific legacy of plate, &c., to *John Browning Edwards* at the end of the will, and the four pecuniary legacies amounting to 400*l.* which occur towards the end of the will. Every other part of the will and codicil relates exclusively to the disposition of the real estate.

Neither the will nor the codicil contains any charge of the debts on the real estate, except that in the last clause of the will the debts are charged on the real estates *in exoneration of the specific legacy of plate, &c. to John Browning Edwards*. It is not in exoneration of the personal estate generally, but only in exoneration of that specific legacy. The charge is limited to that purpose, and its only effect is, that if all the property liable by law to debts before resorting to specific legacies and specifically devised estates should have proved insufficient to pay the debts, the deficiency should be borne by the specifically devised estates in exoneration of the specific legacy bequeathed to *John Browning Edwards*.

The result is, that as to the debts they are left to the operation of law, except only that if all the property liable to them by law has been exhausted before resort-



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ing to the specific legacy and specifically devised estates, and there is still a deficiency, such deficiency shall as between the specific legacy and the specifically devised estates be made good by the latter in exoneration of the former.

How, then, stands the law with respect to the liability of devised real estates to debts, the personal estate being insufficient. It is contended on behalf of the devisees of the real estates devised by the codicil that with respect to wills made since the Wills Act, where there is a devise of certain real estates specifically and also a residuary devise of real estates, the estates comprised in the residuary devise are liable to the debts before the specifically devised estates can be resorted to, and that whereas the estates devised by the codicil are specifically devised, the devise in the will is only a residuary devise, for that, although the *Anglesey* estate is expressly mentioned in the devise, that no more makes it a specific devise of that estate than the enumeration of particular chattels in connection with a general residuary bequest makes the gift of those chattels a specific bequest. On the other hand, it is contended that the estates comprised in a residuary devise are no more liable to debts than those estates which are specifically devised, *i. e.*, devised by a specific description, for that every devise, though expressed in a residuary form, is specific; and, further, that, even were it otherwise, the *Anglesey* estate is specifically devised. On the abstract question I have had occasion not long since to express my opinion (*Dady v. Hartridge (a)*). The only ground that I am aware of, upon which the doctrine rested, that every devise of real estate though expressed in a residuary form was specific,

(a) Ante, p. 236

was this, that until the Wills Act a testator could only devise the estates of which he was seised at the date of his will. That ground has been entirely done away with by the Wills Act, and the ground and reason being gone it appeared to me that as a necessary consequence the doctrine must fall. To that opinion I still adhere, and I do so with the less hesitation when I find that the Master of the Rolls has taken the same view.

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But it is unnecessary for me to go further into this question, because I am of opinion that the devise of the *Anglesey* estate in the will is a specific devise. I have already stated the reasons why I have arrived at the conclusion that the devise in the will is a devise only of the *Anglesey* estate and of such other real estate (if any) as the testatrix should afterwards acquire. If this is so, then the devise of the *Anglesey* estate is specific; and if any part of the devise is residuary, it is the devise of after-acquired estates.

As, then, all the three estates in *Anglesey*, in *Carnarvon* and in *Denbigh* are specifically devised, they must contribute rateably to the debts.

The mortgage debts must follow the general rule. If the personal estate is insufficient to pay them, each of the mortgaged estates must bear its own burden.

With respect to the four pecuniary legacies, they are charged by the will on the real estates.

I had some doubt whether the charge of these pecuniary legacies on the realty was intended to operate for any other purpose than to prevent their affecting specific legacies. But then the charge on the realty would

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have no operation at all, for of course specific legacies cannot be liable to make good general pecuniary legacies. I therefore think that these pecuniary legacies are charged on the realty if the personalty is insufficient to pay them.

But then comes the question, upon which real estates are these pecuniary legacies charged? Are the estates devised by the will alone charged with them, or does the charge also affect the estates devised by the codicil? I think that all the estates are charged with them. The language is, "I charge such bequests and any other pecuniary legacies which I may give by any codicil hereto upon my real estates," not upon "my said real estates." Now, throughout the will, in declaring the trusts of the real estates, the language is, "my *said* real estates," thereby referring specially and exclusively to the estates previously devised to the trustees. But when we come to this charge of the legacies, the language is changed, and (as I must suppose) designedly changed, and the charge is expressed to be "upon my real estates."

I am therefore of opinion that all three estates must contribute rateably to these legacies as well as to the debts, so far as the personal estate is insufficient.

The case now came on to be spoken to on the minutes of decree (a).

Three questions arose—

First. Whether the costs of the suit, including the costs incurred in selling part of the real estate, were chargeable on the personalty primarily, and any deficiency on the real estate, or whether they were chargeable on the estate generally or be apportioned.

A considerable portion of the costs had been occasioned by a sale of the *Anglesey* estate, which it had been found necessary for the general purposes of the estate to sell before the decree, and this question arose upon this portion of the costs.

Second. The several real estates having to contribute *rateably* to the payment of the costs in case of the personal estate being deficient, whether the real estates should for that purpose be valued at their gross values or after deducting any incumbrances charged on them respectively.

It appeared that some of the estates were burdened with heavier charges than others, one estate being incumbered nearly up to its value; and that if the estates were valued at their *gross* values, the costs would be very unequally distributed.

Third. Whether a vendor's lien for unpaid purchase-

(a) See Judgment, ante, p. 247.

charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates, the Court held, that, under the circumstances of the case, the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached.

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*Costs. Devise of Incumbered Estates.*

*Vendor's Lien.*

1. Costs incurred in selling real estate in an administration suit before decree charged on such real estate, and not on the personal estate.

2. Where it is ordered that real estates which are charged with incumbrances shall contribute *rateably* to the payment of costs, such estates must be valued for the purposes of such contribution at the net values, after payment of incumbrances.

3. Where the Court had declared that certain devised estates were devised subject to incumbrances

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money stood in the same position for the purposes of the suit as the other mortgages and incumbrances.

Part of the *Denbigh* estates devised by the testatrix *Jane Thomas* consisted of the *Garth* estate, which she devised under the will of her sister *Trevor Thomas*. *Trevor Thomas* had agreed to purchase this estate and to pay the purchase-money, but died without having paid for the estate, having devised all her real and personal estate to the testatrix *Jane Thomas*, who *also* died having devised the estate, but without having paid the purchase-money due in respect of it, although *Trevor Thomas'* estate was sufficient to have satisfied it.

The only parties interested in these questions were the devisees of the *Anglesey* and *Denbigh* estates.

Mr. *E. F. Smith* for the devisees of the *Denbigh* estates.

First and second. The costs of the sale of real estate for the purpose of paying debts are an expense which the real estate sold ought to bear. Those costs are no part of the general administration, but a special expense incurred by reason of part of the estate requiring conversion. At any rate, in suits for administration like the present, where large costs have been incurred in selling the estates, the fair and reasonable course would be to apportion the costs among the estates, real and personal, according to the relative value of those estates; *Christian v. Foster* (a). The Court will order the costs of the suit to be apportioned on the gross values of the real and personal estates.

(a) 2 Phill. 161.

Third. In regard to the question of the vendor's lien for unpaid purchase-money, if it had been a mere mortgage, notwithstanding the case of *Swainson v. Swainson* (a), it would be payable in the first instance out of the particular estate; but being only a vendor's lien for unpaid purchase-money, it is merely a personal contract of the purchaser, and does not become a complete charge on the estate until it has been made so by a decree of a Court of Equity. In *Hood v. Hood* (b), a case decided under the act of the 17 & 18 Vict. c. 113, Vice-Chancellor *Stuart* held, that a vendor's lien for unpaid purchase-money was distinguishable from a mortgage, and that it did not come within that act. He also cited *Rice v. Rice* (c).

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Mr. *T. H. Hall* for the devisees of the *Anglesey* estate.

First and second. The personal estate must bear all the costs of the suit, and if deficient the real estates must contribute rateably. There is no pretence for the distinction attempted. The administration consists in collecting the assets and paying the debts, and dividing the surplus. If for payment of debts real estate requires to be sold, that is part of the administrative application of the assets. There is frequently some expense incurred in converting particular parts of the personal assets, but it was never heard that those expenses could be distinguished and thrown on the particular fund. For the purposes of contribution, each estate must be estimated at its net value, after deducting the incumbrances affecting it, and not at its gross value, otherwise the costs

(a) 6 DeG., M. & G. 648.

(c) 2 Drew. 73.

(b) 3 Jur. N. S. 684.

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would be very unequally distributed, as some of the estates are incumbered nearly up to their value.

Third. A vendor's lien for unpaid purchase-money stands precisely in the same position as any other mortgage, and therefore must be borne by the *Denbigh* estate, in respect of which the purchase-money is due; *Scott v. Beecher* (a); *Sproule v. Prior* (b); *Birds v. Ashey* (c); *Lord Clarendon v. Barham* (d); *Swainson v. Swainson* (e). The case of *Evans v. Smithson* (f), cited by Mr. Tinney in *Lord Clarendon v. Barham* (d), seems to have been a case of vendor's lien. The case of *Hood v. Hood*, cited on the other side, was decided on the language of *Locke King's Act*, which relates exclusively to mortgages, and not to other incumbrances.

Mr. *E. F. Smith* in reply.

#### THE VICE-CHANCELLOR.

First. It appears to me that, on the question of costs, the cases cited do not apply. Suppose the *Anglesey* estate had not been sold before the decree. It would be necessary to sell the estate, and there being no clause exonerating the personal estate, all the general costs of administration must come out of the personal estate in the first instance, though it may make no difference in the end, inasmuch as the more the personal estate is exhausted by the payment of costs, to so much greater extent will it be necessary to resort to the real estate for the payment of debts.

(a) 5 Mad. 96.

(b) 8 Sim. 189.

(c) 24 Beav. 618.

(d) 1 Y. & C. C. 688.

(e) 6 De G., M. & G. 648.

(f) Not reported.

But where special costs are incurred in relation to the real estate irrespectively of the personalty, it may be that such costs ought to be charged on the real estate.

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In the present case, if there had been no sale, and it was now necessary to raise by sale or mortgage of the *Anglesey* or *Denbigh* estates what is necessary to supply the deficiency of the personal estate, all the costs up to this time would be the costs of the general administration, to be borne by the personal estate; but where any of the real estates are sold under a decree, the costs incurred by such sale would be the costs to which, it appears to me, the estates sold would be liable.


In this case, for the convenience of the estate generally, it became desirable to sell the *Anglesey* estate at once; and I think the same principle must apply. All the costs of the suit generally must be primarily paid out of the personal estate, but the costs and expenses of the sale must be borne out of the particular estate sold.

Second. As to the mode in which the real estates are to be valued. It has been contended (and I think justly) that they should be valued after deducting the charges on them respectively. What will have to be deducted from the value of each will be the incumbrance on each particular estate, so far as it will not be satisfied out of the personal estate.

Third. With regard to the vendor's lien for unpaid purchase-money for the *Denbigh* estate purchased by *Trevor Thomas*, it appears to me that for the purposes



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of this suit this lien must be treated just as any other incumbrance. The question does not turn upon *Locke King's Act (a)*, that act relating only to mortgages, and not to incumbrances generally. I think that for the purposes of the present suit the lien for the unpaid purchase-money must be treated as standing precisely on the same footing as if it had been a mortgage.

(a) 17 & 18 Vict. c. 113.

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1860.  
Feb. 27, 28.  
March 6.

*Specific Legatee.  
Calls.*

DAY v. DAY.

IN this cause, which was for the administration of the estate of *Edwin Horatio Day*, one question turned on the following bequest in his will, dated the 18th July, 1856:—"I give to him (the testator's son *Horace*) also any shares in railways, mines and other undertakings that may belong to me at my decease."

At the time of his death, the testator had shares in the *Ceylon Railway*, upon which calls were made after his death. The railway was not completed. The question was, whether these calls were to be paid by the legatee, *Horace Day*, or out of the testator's estate.

Mr. *Walford*, for the Plaintiff, stated the point.

Mr. *Fischer* for the residuary legatees.

The legatee ought to pay these calls; they are calls not accruing due till after the testator's death; they are like the outgoings of a leasehold. The shares are held subject to the payment from time to time of calls, which are analogous to the ground-rent of a leasehold.

Mr. *Hastings*, for *Horace Day*, referred to the judgment in *Armstrong v. Burnet (a)*. The testator took certain shares; that was a contract to pay the calls; the calls are in truth the purchase-money, which is due from the moment he takes the shares. Here the

Where a testator takes shares in a company, any payments remaining due at or becoming due after his death, which are necessary to constitute him a complete shareholder, must be paid by his general personal estate; but if he was a complete shareholder, payment of calls made after the testator's death must be made by the specific legatee of the shares.

(a) 20 Beav. 424.

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railway is not completed; the testator's interest in the railway was not complete till he had paid the calls. His estate must therefore pay them. He also cited *Blount v. Hipkins* (a).

Mr. *Boyle* for children of the residuary legatee.

Mr. *Sotheby* for other parties.

Mr. *Fischer* replied.

The other cases cited were *Jacques v. Chambers* (b); *Addams v. Ferick* (c); *Barry v. Harding* (d), and the cases referred to in *Armstrong v. Burnet* (e).

The VICE-CHANCELLOR (referred to the words of the bequest, and continued :)—

There are no other words in the will to assist in the construction. No doubt if there could be found in the will a sufficient indication that the testator meant the legatee either to bear or not to bear the liability to future calls, that intention must be followed out. The question here is, whether, inasmuch as the testator had bound himself in the usual way to the railway company to pay calls on his shares in this railway, that obligation of the testator has this effect, that as between the specific legatee and the general residuary legatee the general residuary estate is liable, in exoneration of the specific legatee, to pay calls not made till after the testator's death.

One thing, at least, is obvious, that to hold the re-

(a) 7 Sim. 43.

(d) 1 Jo. & Lat. 475.

(b) 2 Coll. 435.

(e) 20 Beav. 424.

(c) 26 Beav. 384.

siduary estate liable would have the effect, in many cases, of occasioning very great inconvenience. For wherever a testator holding shares in a joint stock company, on which all the calls have not been made, bequeaths them specifically, if his residuary personal estate is to be liable for all future calls, it comes to this, that you must keep back a portion of the residuary personal estate until all calls that may be made at any time, however remote, are paid up. I should have great hesitation in coming to the conclusion that a testator ever intended that. It is quite true that in some, perhaps in most undertakings, all the calls would be made before a very long period had elapsed, such, for instance, as a railway. But there are others, for instance, an insurance office, (as to which we know that if its tables are properly constructed, it requires very little capital) in which it might not be necessary to make all the calls for many years; nay, perhaps they might never be required. In such cases I do not see where the inconvenience is to end. You cannot tell how long you must tie up the testator's estate. I do not say this argument is conclusive; but, consistently with the principles of law, the Court can decide against the liability of the testator's general estate, it would, at least, avoid a very great and grave inconvenience. And I cannot help feeling strongly persuaded that in all such cases, if you could ask a testator, whether he intended the particular legatee to pay subsequent calls, he would say, "of course; I put him in my place as to these shares; I give him the benefit *cum onere*."

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Now let us see how the matter is affected by authority. If it were *res integra*, I should say generally that the specific legatee must pay the calls made subsequently to the testator's death. But it appears to me

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to be a just principle, which the Master of the Rolls recognized in *Armstrong v. Burnet*, that where a testator purports to bequeath shares in a company, if at his death any payments remain to be made which are necessary for constituting him a complete shareholder, those payments must be made out of the general estate. But I do not see any reason to put on the same footing calls made after the testator's death, which are necessary, not for constituting the testator a complete shareholder, but for rendering the undertaking itself a working concern. Having regard to the cases, I cannot help thinking that if the learned judge who decided *Jacques v. Chambers* and *Wright v. Warren* had not thought himself bound by *Blount v. Hipkins*, he would not have arrived at the conclusion that he did arrive at. I think the Master of the Rolls in *Armstrong v. Burnet*, felt some difficulty in reconciling the decision in that case with that which he felt to be the just principle, and upon which he decided *Addams v. Ferick*, namely, that the question depends entirely upon this, whether the call was made before or after the testator's death. I shall follow that view.

It has been argued that the general estate ought to bear the calls till the undertaking is a going concern, that is, till the railway is opened for traffic. It strikes me that to adopt that principle would lead to great difficulties. Suppose, at the testator's death the railway had been finished for a portion only of the whole intended line, and was carrying so far, and was, therefore *pro tanto* a going concern. Is that a completion of the undertaking in the sense implied in the argument? I feel strongly persuaded that the testator never meant to say, "if when I die the *Ceylon Railway* carries throughout the line, the specific legatee is

to bear the calls; but if it only carries for a limited portion of the line, then my residuary estate is to bear them."

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I cannot give any weight to the consideration, that it was the testator's obligation to pay them. If that were to afford the rule, his estate ought to bear all future ground rents of leaseholds.

I am of opinion that the right principle is, that if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate; but if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee.

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1860.  
March 5, 6.

*Separate Estate.  
Restraint on  
Anticipation.  
Arrears and  
future Payments  
of Annuity.*

PEMBERTON v. M'GILL.

Where an annuity was given to an executrix, who was a married woman, to her separate use without power of anticipation, and such executrix had misappropriated assets of the testatrix: Upon a suit for the administration of the testatrix's estate, the Court *held*, that in taking the accounts, payments of the annuity which were in arrear were liable to be applied to make good the executrix's misappropriations; but that the future payments, being subject to the restraint on anticipation, were not so liable.

THE question in this case was, whether the arrears and future payments of an annuity payable to an executrix, who was a married woman, to her separate use and without power of anticipation, were applicable to make good certain assets of the testatrix which the executrix had misapplied.

*Sarah Shuter*, being possessed of considerable real and personal property in *England* and *America*, by her will, dated the 15th of November, 1852, bequeathed the residue of the estates, of which she might die possessed, (except such of them as were in *America*) to the Plaintiffs and two other persons, whom she appointed her trustees, upon trust to sell the same and pay the debts and legacies given by her will, and invest the residue in such English or American securities as *S. E. S. M'Gill* should appoint, and in default upon trust that the trustees should pay thereout an annuity of 300*l.* (which by a codicil she increased to 350*l.*) to *S. E. S. M'Gill* for her separate use, without power of anticipation; and the testatrix appointed *S. E. S. M'Gill* executrix of her will.

The testatrix, *Sarah Shuter*, having died in 1854, *S. E. S. M'Gill* as executrix took possession of the household furniture, and all the assets of the testatrix, which were in *England*, and sold the same and applied the proceeds of such sale to the extent of 4,000*l.* to her own use, but gave no notice of such sale to the trustees.

*S. E. S. M'Gill* had applied for probate of the testatrix's will, but being a married woman, and living apart from her husband, who resided in *America*, she was unable to obtain probate, her husband not concurring with her in the application.

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It appeared that the annuity of 350*l.* had fallen into arrear, to the extent of nearly 2,000*l.*

Under these circumstances the Plaintiff, as one of the trustees, filed a bill for the administration of the estate of *Sardh Shuter*, for an account and an injunction as against *S. E. S. M'Gill*, and for a receiver of the testatrix's estate and effects.

Mr. *Baily* and Mr. *Karslake*, for the Plaintiffs, submitted, that the executrix having misappropriated the assets of the testatrix, it was not equitable that she should be allowed to receive anything without accounting for what she had so misapplied. With regard to the arrears of the annuity, there could be no doubt that they were liable to make good her defaults. With regard to the future payments of the annuity, they submitted that the separate property of a married woman was just as liable to make good her defaults as the property of a *feme sole*, and that the proviso against anticipation did not alter the case; *Vaughan v. Vanderstegen* (a); *Wilton v. Hill* (b); *Derbshire v. Holme* (c).

Mr. *Cotterell*, for the executrix *S. E. S. M'Gill*, submitted that the separate estate of a married woman without power of anticipation could not be applied by the Court in making good her defaults; *Jackson v.*

(a) 2 Drew. 165.

(b) 4 W. R. 66.

(c) 3 De G., M. & G. 80.



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*Hobhouse* (a); *Robinson v. Wheelwright* (b); *Barrow v. Barrow* (c); *Clive v. Carew* (d).

Mr. *Baily*, in reply.

The VICE-CHANCELLOR reserved judgment.

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March 6. The VICE-CHANCELLOR said, that he had no hesitation in coming to the conclusion that the arrears of the annuity, which of course were not affected by the restraint on anticipation, must be applied in making good the misappropriations.

With regard to the future accruing payments of the annuity the case was different; and he was of opinion upon the authorities that such accruing payments could not be made liable in such a way. The case of *Clive v. Carew* differed from the present, as in that case there was no restraint on anticipation.

He had come to the conclusion, although his inclination would have been to have made the future accruing payments liable to make good the misappropriations, that he could not do so.

(a) 2 Mer. 483.

(b) 6 De G., M. & G. 535.

(c) 4 K. & J. 409.

(d) 5 Jur. N. S. 487.

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1860.  
March 20.

*Costs.*  
*Disclaimer.*

WARD v. SHAKESHAFT.

**T**HE only question in this suit, which was for foreclosure, was as to the costs of some of the Defendants who had disclaimed. What disclaimer entitles a Defendant to his costs.

With regard to *Willson*, one of the disclaiming Defendants, the Plaintiff had made him a Defendant as being a judgment creditor of the mortgagor. It appeared that he had notice of the suit, but only disclaimed by his answer.

*Joseph Williams*, another disclaiming Defendant, had given to the Plaintiff notice before the commencement of the suit that he was a mortgagee of the premises included in the Plaintiff's mortgage. This Defendant by his answer simply submitted his rights to the judgment of the Court.

*Henry Steel*, another of the Defendants who disclaimed, and who had been made a Defendant as being another mortgagee, put in his answer and subsequently filed an affidavit, offering to disclaim on payment of his costs.

*James Cazenove*, another Defendant, had been made a Defendant as the assignee under the bankruptcy of *John Shakeshaft*, who had been also made a Defendant as a subsequent mortgagee. With regard to the Defendant *Cazenove*, it appeared that by his answer he admitted notice of the suit and had instructed his solicitors to appear for him, but before such appearance his

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solicitors, in April, 1859, wrote a letter to the Plaintiff's solicitors, stating that the Defendant *James Cazenove* disclaimed all right and interest in the subject matter of the suit, and was willing and offered to have the bill dismissed as against him without costs up to that time, but that, notwithstanding that, if the Plaintiff desired the Defendant *Cazenove* to appear they would enter an appearance for him, but in that case they should ask for his costs. The Plaintiff's solicitors answered that *Cazenove* ought to have immediately disclaimed on notice of the suit, and that if the bill was then dismissed as against him the Plaintiff's title would be defective in case of a foreclosure, and therefore he must appear and disclaim by answer, and the bill could then be dismissed as against him without costs. The Defendant *Cazenove* consequently put in an answer stating that he did not claim, and never had claimed, any interest in the subject matter of the suit or in the mortgaged premises, and had always been ready to disclaim, and he submitted that he was entitled to his costs, at all events since the letter of April, 1859.

*John Broadhurst*, another Defendant, was made a Defendant, as having an interest in the subject-matter of the suit in respect of a decree which he had obtained as the next friend of *Mary Broadhurst* against the Plaintiff's mortgagor, *Enoch Gerrard*, in a suit of *Broadhurst v. Gerrard*, by which decree certain monies were ordered to be paid to the credit of the cause of the said *Enoch Gerrard*. It appeared that the Defendant *Broadhurst* before service but after the filing of the bill undertook to appear; and he disclaimed by his answer as follows:—"I never did claim any interest in the messuages and hereditaments comprised and described in the indenture in the said bill mentioned, or any part

thereof, and I disclaim all right, title and interest in the same messuages and hereditaments, and every part thereof; and I say that no application was made to me by or on behalf of the Plaintiff prior to the institution of the suit, and I disclaim any interest in the matters in question in the suit, and if the Plaintiff had applied to me before the institution of the suit to disclaim, I would, without suit, have released and disclaimed all interest in the said messuages and hereditaments and every part thereof, and I humbly submit that I ought to be paid my costs of the suit."

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Mr. *Glasse* and Mr. *W. D. Evans*, for the Plaintiff, referred to *Ford v. Lord Chesterfield* (a); *Talbot v. Kemshead* (b).

Mr. *Freeling*, for the Defendant *Cazenove*, submitted, that he was entitled to his costs.

Mr. *Jessel*, for the Defendant *Broadhurst*, submitted, that the bill showed that he was not a judgment creditor under the 18th sect. of 1 & 2 Vict. c. 110.

Mr. *C. H. Smith*, for the Defendant *Willson*, cited *Bradley v. Borlase* (c).

Mr. *Glasse*, in reply as to *Broadhurst*.

*Bellamy v. Brickenden* (d) was also cited.

The VICE-CHANCELLOR.

With respect to *Willson*, who was a judgment creditor, he was aware of the suit and only disclaimed by his answer, the bill must therefore be dismissed as

(a) 16 Beav. 520.  
(b) 4 K. & J. 93.

(c) 7 W. R. 125.  
(d) 4 K. & J. 670.

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against him without costs. With respect to *Williams*, who was a mortgage-creditor, and gave notice to the Plaintiff, he, by his answer, has simply submitted his rights, and as to him the common decree must be made. With respect to the Defendant *Steel*, he did not disclaim by his answer, but filed an affidavit after answer; and by it offered to disclaim on being paid his costs: he is clearly not entitled to his costs. With respect to *Cazenove*, the assignee of the mortgagor, he undertook to appear first, and offered to disclaim and have the bill dismissed against him without costs, which was clearly what he ought to do: the Plaintiff having thought fit to continue the suit as against him, he is entitled to his costs. With respect to the Defendant *Broadhurst*, he is the only one whose case is doubtful. He never claimed and never had any interest according to the statements in the bill. Although he got a decree against *Gerrard*, nothing was paid to him, but certain monies were ordered to be paid into Court to the credit of the cause; but this did not constitute him a judgment-creditor. A correspondence took place, and *Broadhurst* undertook to appear before actual service of the bill but after bill filed. *Broadhurst* had a right to know what he had to do with the matter, and the Plaintiff must have seen that he had no connection with it. The Defendant *Broadhurst*, being made a party, filed an answer, by which he stated that he never claimed and now disclaimed all interest in the matters in question, and further went on to say that no application was ever made to him before the bill was filed. That was true; and it being proposed to dismiss him without costs, he objected, and the question was, whether his disclaimer was sufficient. [It appeared to his Honor, inasmuch as he never had and never claimed any interest and disclaimed by his answer, he was entitled to his costs.]

1860.  
July 9.

*Winding-up  
Acts.*

*Compromise.  
Direction of  
Court.*

22 & 23 Vict.  
c. 60, s. 19.

*In re* NORTHUMBERLAND AND DURHAM  
DISTRICT BANKING COMPANY.

*Ex parte* TOTTY.

**T**HE question in this case, which came on upon an adjourned summons, was, whether the Court would direct a compromise proposed to be entered into by the official liquidators appointed under the winding-up with a body of thirty-five shareholders, without the liquidators stating to the Court or to the creditors the particulars of the proposed compromise, or the grounds upon which they had decided that such compromise would be beneficial to the creditors.

The compromise was proposed to be made under the 19th section of the Joint Stock Companies Amendment Act, 1858 (a).

(a) 21 & 22 Vict. c. 60. The 19th section is as follows:—"The 16th section of the Joint Stock Companies Act, 1857, shall be repealed, and in lieu thereof be it enacted as follows: the liquidators shall have power to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or

contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory or other debtor or person apprehending liability to the company, upon the receipt of such sums payable at such times and generally upon such terms as may be agreed upon, with power for the liquidators to

The Court, in directing a compromise under the 19th section of the 21 & 22 Vict. c. 60, exercises a judicial discretion, and will not direct the official liquidators to enter into a compromise without having the means of itself forming an opinion as to the propriety of the compromise.

Therefore where official liquidators applied to the Court to direct a compromise, which had been proposed by a body of thirty-five shareholders in a

company which was being wound up, to pay among them an aggregate sum in discharge of their liabilities as shareholders, but without disclosing to the Court the particulars or *data* of such compromise, the Court refused the application.

It is in the discretion of the Court whether notice shall be given to creditors under the 19th section of the 21 & 22 Vict. c. 60.

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The proposal was in effect that the thirty-five shareholders named in the list contained in the proposal should subscribe 157,000*l.* for the purpose of obtaining their release from all future and present calls and all liability as shareholders in the banking company, and of purchasing certain property of the bank. It was proposed that they should pay 85,000*l.* in respect of their release from liability as bank shareholders, and two sums of 65,000*l.* and 7,000*l.* for the purchase of the bank property by certain instalments at specified dates. That no joint liability should attach to the subscribers in respect of either of those sums, but that each individual subscriber should be responsible only for the amount subscribed by him, and should be entitled to his release as a bank shareholder, subject only to his discharging the sum agreed to be paid by him. A sealed envelope accompanied the proposal containing the particulars of the subscription for the 157,000*l.*, which was to remain deposited and unopened in the hands of the official liquidators until the Court should have decided upon the arrangement, when if the decision were favorable to the compromise, the enve-

take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts or liabilities, subject to the proviso that, where an order has been made by the Court for winding up a company compulsorily, or where an order has been made in pursuance of the said 19th section for the continuance of a voluntary winding up, no such compromise shall be made, except in accordance with the directions of the Court, as ex-

pressed generally in any order made by the Court, or as given in each particular case, and after giving such notice to creditors, or any portion of them, as the Court shall direct; and that where a company is being wound up altogether voluntarily, no such compromise shall be effected, except with the sanction of a special resolution of the company, or of a general or particular power delegated to the liquidators by a special resolution."

lope was to be opened, otherwise it was to be returned unopened.

The official liquidators had made an affidavit in support of the compromise, stating that from the information they had been able to obtain, the compromise was a fair one, and would be beneficial to the creditors.

Mr. *G. M. Giffard* and Mr. *Field*, for the official liquidators in support of the proposed compromise, submitted that the Court had power under the 19th section of the Joint Stock Companies Amendment Act to direct the liquidators to enter into a compromise without being informed of the details of such compromise. It was the office of the liquidators to use their discretion as to whether a compromise was a proper one for them to enter into, and the Court would act upon their opinion. The act, it was true, required notice to be given to such of the creditors as the Court might direct, but the act did not require notice to be given to all the creditors, neither did the act require that the creditors should consent to any proposed compromise. The creditors were not entitled to be informed of the particulars of the compromise. If the Court held otherwise, the effect would, in very many cases as it would in the present, be to put an end to the whole compromise, as shareholders proposing to compromise would not permit the state of their affairs to be disclosed to the large body of creditors.

Mr. *Toller* and Mr. *Dickinson* appeared for the thirty-five shareholders proposing to compromise.

Mr. *Baily* and Mr. *Marten*, Mr. *Wickens*, Mr. *Cotton*, and Mr. *C. Swanston*, appeared for various creditors and supported the compromise.

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*In re*

NORTHUMBER-  
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Mr. *Glasse*, Mr. *Roxburgh* and Mr. *Southgate*, for creditors opposing the compromise, were not called upon.

The VICE-CHANCELLOR.

This is an application by the official liquidators, calling upon the Court to determine whether a certain proposal of compromise which has been made to them by some thirty-five contributories should be adopted. By that proposal those thirty-five contributories propose to pay a certain aggregate amount in satisfaction of all they may ever be liable for, and in addition to that to take certain estates at a price said to be beneficial to the creditors. A large proportion of the creditors support the application, but a certain section of them object to it; and what they say is this: that if they knew all the facts and circumstances and the grounds upon which the liquidators have formed an opinion favorable to the adoption of the compromise, they (the objectors) might very possibly come to the same conclusion as the other creditors and the liquidators have arrived at; but that they have not the means of forming a judgment, nor has the Court the means of forming a judgment upon the subject; and they object to the Court coming to a conclusion when it has not the means of exercising any judgment as to its propriety.

I am under the necessity of saying that that objection is one which it is impossible for me to get over in the view I take of the construction and effect of the act of parliament, for, after all, the question comes to this: what is the construction and effect of the 19th section of the act of 1858.

Now the proposal is a proposal made by thirty-five

contributories, and I may consider that, practically, though not perhaps strictly and accurately, they are the only remaining contributories who can pay anything. I will assume, that, if not all, at least most of the thirty-five gentlemen are persons engaged in commercial or trading occupations, at or in the neighbourhood of *Newcastle*; and of course not only their means of subsistence, but their means of paying any debt, depends not simply on what property they may happen to possess at the moment, but on their continuing to carry on their business; at least, if they can continue to carry on their business and are allowed time, they would be enabled to pay more than they would be able to pay if measures were taken to enforce immediate payment of what is due from them.

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I must regard the parties before me as standing in the relation of debtors and creditors. Some of the creditors supporting, and some of them opposing, the compromise. A creditor has a right, if he chooses, to say, "I will not compromise with my debtor; I do not care if I ruin him; I insist on compelling him at once to pay me every farthing he owes me;" it may be very foolish and very suicidal to do so; but I have no right to say, if he insists on it that he shall not do so. The question is, what power I have under this act of parliament to control the will of the creditor, or a section of creditors, who may think fit to take a view which I may not think a wise view, and compel them to accept a proposed compromise to which they object.

Now I have got before me an affidavit from the official liquidators (all gentlemen who are perfectly competent and trustworthy) representing that in their opinion, founded on their knowledge of the parties and informa-

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tion they have procured by instituting inquiries as to their means, the compromise would be beneficial to the creditors. I have not however got each of these contributories coming forward separately and individually, and proposing to satisfy me that he is not able to pay the whole of his liability, but that he can only pay a certain portion of it, and that this he can do partly out of his own means, and partly with the assistance of his friends, and by being allowed time to pay by instalments. It is not that case; but it is this:—All the thirty-five have communicated together (and I do not say they have acted otherwise than wisely and prudently in the matter), and *inter se*, not disclosing their circumstances to the world at large or to the Court, but disclosing them to each other, they find that *A.* can pay so much, *B.* can pay so much, and so on, and that the aggregate of those sums is a certain amount; and they propose to pay that aggregate amount in full satisfaction of the aggregate liability of all the thirty-five; and they represent that that sum is all they can possibly pay, not only out of their own present means, but with the assistance of friends, and by having time given them to carry on their respective businesses, so as to make the most of them; whereas if they were to disclose to the world at large their respective pecuniary circumstances (most of them being in trade or in some commercial or manufacturing business) it would be extremely injurious to them, and tend to diminish their means of payment. They further say they have no objection to disclose everything to the official liquidators, because those gentlemen can be trusted to keep things secret; and as I understand they have disclosed to the official liquidators their respective pecuniary circumstances. The official liquidators are enabled to say from what has been thus disclosed to them, and also by the means they have of making in-

quiries indirectly of the neighbours and trading connections of these thirty-five contributories, that in their opinion, the amount which is offered in the aggregate is as much as those contributories can possibly pay, and that it would be extremely beneficial to adopt the proposal; and that if they were to proceed by a call, and by compulsory process, the creditors would get considerably less than they would get by adopting the proposal.

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Now the cases have been very numerous in which the judge at chambers has been asked to approve of compromises with contributories in winding-up cases; and the usual course is to require an affidavit from the contributory showing the state of his pecuniary circumstances, as for example, that he is only possessed of such and such property,—that his debts amount to so much,—that his business brings him in so much, and that he is unable to pay more than a certain amount; and upon consideration of those facts the judge decides whether the proposed compromise shall be adopted or not.

But the compromise now proposed is of a very peculiar character. I am asked to sanction a compromise, not with each contributory separately and individually, but with the whole body of them,—and that, too, without knowing anything of the pecuniary means of each or any of them, or even of the amount which it is proposed that each or any of them should pay. The question whether I should be justified in adopting that course depends upon the construction of the act of parliament.

In the act of 1856 this power was given by the

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90th section to the official liquidators, with the sanction of the Court "to refer disputes to arbitration and compromise any debts or claims." That was to be done with the sanction of the Court. Then came the act of 1857, amending the former act, and the 16th section of the act of 1857 deals with the power given by the act of 1856 thus: "The power of compromising debts and claims given by the principal act to the liquidators therein mentioned shall be deemed to extend to the compromise of any calls or debts due from any contributory or alleged contributory to the company on receipt of a smaller sum in lieu of a greater, or upon such terms as may be agreed upon, with power to the liquidators to take any security for any calls or debts so due, and to give effectual discharges on completion of such compromise, subject to this proviso, that no such compromise shall be made by any official liquidator except with the sanction of the Court, and after giving such notice to creditors, and subject to such conditions as to obtaining the consent of creditors, or any portion of them, as the Court may direct, and that no such compromise shall be made by the liquidators appointed on the voluntary winding-up of a company, except with the sanction of a special resolution."

That section introduces a new consideration not suggested by the act of 1856. I mean the question, how far notice should be given to the creditors, and how far, even the consent of creditors to a proposed compromise should be required? The effect of that section, with regard to creditors, is to leave it entirely to the discretion of the Court whether it will proceed without notice to creditors; or whether notice shall be given to any and what creditors; or whether it will require the consent of the creditors before it will sanction the compromise.

In dealing with questions under this section, inasmuch as the creditors are, if not the only persons interested, at least, the persons principally interested in the decision of these matters, I have always strongly leaned to the side of requiring notice to be given to creditors, or at least to some of them; and in this particular case I have done so, notice having been given to certain large creditors, such as the *Bank of England* and others, and also to certain bodies of creditors who had appointed committees or delegates to act for them. But whatever might be the proper course with respect to giving notice to creditors, it is at all events clear that, under the act of 1857, no compromise can be made with any contributories except with the sanction of the Court.

Then came the act of 1858, which is the act under which this present proceeding must be disposed of.— [His Honor here read the 19th section of the act of 1858, and proceeded.]

That section provides, that the liquidators shall not make the compromise except in accordance with the direction of the Court. If there is any difference between the effect of the language used here and that used in the act of 1857, where the words “sanction of the Court” are used, the language here seems to be the stronger for requiring the Court to interfere, assume an active function, and to exercise its own judgment on the subject of the proposed compromise. The Court is *to direct* the liquidators. I do not say that under the words in the other act of parliament the Court would not have been bound to exercise its judgment. I think it would; for I do not see how the Court could be called on to give its sanction to anything without exercising its judgment as to the propriety of giving that sanction.

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But whatever question might have been raised as to the word "sanction," I think there can be no doubt upon this clause, which provides that the liquidators shall not make any compromise except in accordance with the "direction" of the Court. I do not see how the Court can direct the official liquidators to make a certain compromise without exercising its judgment on the propriety and expediency of that compromise.

Now, assuming that the Court has power to give a general direction that the liquidators shall or may make compromises with contributories in a certain class of cases, as well as to give the direction in a particular case, still the question comes to this:—when I am asked to give a general direction, or (as in the present instance) to give a direction in a particular case (if, indeed, this may be called a particular case, which is an aggregate of some thirty-five cases), can I give such a direction without being able to form in my own mind an independent judgment (that is, independent of the opinion of others), with a full knowledge of all the facts and circumstances? Is it right and proper that I should give my direction that the official liquidators should carry out this compromise, merely because they think it would be beneficial, and because a large body of creditors think so too, I myself not having the means of forming any judgment of my own on the subject? Can I delegate my authority, which is to *direct*, to those who come and ask me for a direction? The liquidators come and ask me for my direction to carry out this compromise; though I have not the smallest reason to doubt that their view is a sound view, can I say to them, I direct you to carry this out because you are of opinion that I ought so to direct you, when from the very nature of the case I cannot know and must

not know the facts on which you have arrived at that conclusion? I cannot conceive how I can do so upon the general principles of the Court; and there is nothing in the words of this section to justify a deviation from those general principles. Whenever I am to exercise a judicial discretion, which is in effect a judicial judgment, not indeed on a point of law but on a question of expediency and propriety, I must, before I can come to a conclusion on that, know the circumstances on which a right conclusion on the matter depends; and from the nature of the present case I cannot know them. It was indeed suggested, when the original proposal was brought in, that a sealed paper should be placed in my hands stating the amount which each individual shareholder among these thirty-five was to contribute. That would not have relieved the matter from the difficulty I have been adverting to; but even if it would, the secrecy alone was conclusive with me why I could not possibly adopt that course. I declined to be a party to any plan by which I was to have something secretly communicated to me, on which I was to decide, without its being known to all the parties here in conflict. It would be out of the question that a Court of Justice should decide any matter on certain facts which are kept concealed from either of the adverse parties.

The creditors opposing the compromise must have their costs out of the estate.

NOTE.—The Vice-Chancellor's decision in this case was affirmed on appeal by the Lords Justices, on the 28th of July, 1860.

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Dower.
Timber.
Mines.

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A. B. died intestate seised of real estates under which

IN the month of November, 1843, *Stephen Dickin*, the first husband of the Defendant *Mary Hamer*, died were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed in May, 1845, by his infant daughter and heiress at law by her next friend for the administration of his estate, it was by the order of the Court on further directions, dated the 24th day of May, 1846, declared that the intestate's widow was entitled to dower out of his freehold estates, and it was referred back to the Master to inquire what was due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the real estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into Court to the account of the infant Plaintiff, and the Master was ordered to prosecute an inquiry directed by the decree on the hearing (dated the 12th December, 1845) respecting the leasing the intestate's estates for coal mines. Under an order of the Court of the 7th of March, 1855, the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. On the 28th of April, 1855, the widow again married. On the 23rd of April, 1856, the Master, by his report, found it would be fit that the whole estate should be let for coal mines. On the 8th May, 1856, an order was made approving of a provisional agreement entered into for a lease, and directing that the agreement should be carried out by a lease to be settled by the Judge in Chambers. A lease dated 15th November, 1857, was settled in chambers, in which the infant Plaintiff granted and demised, and the widow as guardian, with the consent of her second husband, granted, demised, leased and confirmed all the mines under the estate except within a certain area round a house, the rents and royalties (and amongst others a rent or sum of 4*l.* 4*s.* for every acre of the surface used for raising coal, &c.) being reserved to the infant Plaintiff. All the covenants were entered into by or with the infant.

Held, 1st, that the proceedings which had taken place in the suit did not amount to an assignment of dower.

2ndly. That the widow was entitled in respect of her dower to one-third of the yearly income which had arisen or might arise from the amount of the purchase-money of poles and small timber cut and sold under the direction of the Court.

3rdly. That as the lease was intended to be made for the benefit of the infant alone, the widow was not entitled in respect of dower to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her husband the intestate.

Held, also, that until an assignment the widow was entitled to one-third of the rents of the real estate of the land, exclusive of the rents and profits of

intestate, leaving the infant Defendant *Elizabeth Sarah Dickin* his only child and heiress at law.

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On the 2nd of May, 1845, a bill for the administration of the estate of the intestate was filed by *Elizabeth Sarah Dickin* by her next friend, against the Defendant *Mary Hamer*, then *Mary Dickin*, who had taken out letters of administration to the effects of the intestate.

By her answer, filed on the 27th October, 1845, the Defendant *Mary Hamer* submitted, that it ought to be ascertained whether she was entitled to dower out of the real estates of the intestate.

By a decree in the cause, dated the 12th December, 1845, it was, amongst other things, referred to the Master to inquire and state, whether the Defendant *Mary Hamer* was entitled to dower out of any or either and which of the real estates of the intestate, and also whether it would be fit and proper that the whole of the said real estates, or any and what part thereof, should be let for coal mines.

The Master by his report, dated the 16th of July, 1846, (amongst other things,) found that the Defendant *Mary Hamer* was entitled to dower out of all the intestate's real estate, subject to certain debts charged thereon; but he made no report respecting the letting

the mines, but inclusive of the rents paid by the lessees for any portion of the surface of the land used for the purpose of the mines.

And *semble*, that a widow dowable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third of the royalties as *corpus*.

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any part of the estate for coal mines, the parties having declined to prosecute the inquiry before him.

By an order, dated the 26th day of June, 1846, the Defendant *Mary Hamer* was appointed guardian of the person of the infant Plaintiff during her minority, or until further order of the Court.

By an order on further directions, dated the 24th day of July, 1846, it was declared that the Defendant *Mary Hamer* was entitled to dower out of the freehold estates of the intestate; and it was referred back to the Master to inquire what was due to the Defendant *Mary Hamer* in respect of her dower from the death of the said intestate; and it was ordered that the Defendant *Mary Hamer* should receive and collect the rents and profits of the real estate of the said intestate during the minority of the Plaintiff, and keep down the interest on the mortgage to be created (as therein mentioned), and retain the annual sum of 60*l.*, or such other sum as the Court should direct, for the maintenance of the Plaintiff; and that the Defendant *Mary Hamer* should from time to time pay the residue of the said rents and profits into the bank to the credit of the cause, to an account to be entitled "The Account of the Infant Plaintiff *Elizabeth Sarah Dickin*;" and it was ordered that the said Master should prosecute the inquiry by the decree on the hearing directed, respecting the leasing of the intestate's estates, or any part thereof, for coal mines.

By an order, dated the 7th day of March, 1855, it was ordered that the Defendant *Mary Hamer*, the receiver of the rents and profits of the real estates of the intestate, should cut down and sell by private contract

certain poles and small timber standing and growing on part of the said real estates, and that the said *Mary Hamer* should account for the proceeds of such sales in passing her accounts as receiver. The said poles and small timber were cut down in pursuance of the said order, and the proceeds of the sale were duly accounted for by *Mary Hamer* in passing her accounts.

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On the 28th of April, 1855, the Defendant *Mary Hamer* was married to her second husband the Defendant *David Hamer*. On the 23rd April, 1856, the Master made a report, by which he found it would be fit and proper that the whole estate should be let for coal mines. On the 8th of May, 1856, an order was made approving of the provisional agreement for a lease, and directing that the agreement should be carried out by a lease, to be settled by the Judge in chambers. The lease, which was settled in chambers, was dated the 15th November, 1857, and was made between the infant Plaintiff *Elizabeth Sarah Dickin* of the first part, the said *David Hamer* and *Mary* his wife of the second part, *Edward Williams* of the third part, and *G. B. Bloomer* and *Matthew Frost* of the fourth part (and after certain recitals mentioned in his Honor's judgment), the said *Elizabeth Sarah Dickin*, with the consent and by the direction of the said *Edward Williams*, demised and leased, and the said *Mary Hamer*, as such guardian as aforesaid, with the consent and approbation of *David Hamer* and of *Edward Williams*, demised, leased and confirmed, unto *G. B. Bloomer* and *Matthew Frost*, their executors, administrators and assigns, all the mines, seams, rows, veins and beds of coal and vein-stone in or under the real estate therein described, consisting of 155A. 3R. 12P., with the usual powers to dig and sink any pit or pits, or shaft or shafts, to build, erect and set up engines, machinery, railway, devices,

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roads and passages on any part of the land, except within 100 yards of the house therein mentioned (the said persons parties of the fourth part making satisfaction to the owners or occupiers for the time being of the land for any injury or damage done to the surface, except such as might arise from underground workings), To have and to hold the said mines, &c. to *G. B. Bloomer* and *Matthew Frost* for twenty-one years, they paying to *Elizabeth Sarah Dickin*, her heirs and assigns, certain rents, rates and royalties, and, amongst other things, a rent or sum of 4*l.* 4*s.* for every acre, and so in proportion for any less quantity than an acre, of the surface of the land entered upon and used for raising coal, &c. All the covenants were entered into by or with the infant Plaintiff, and none by or with the Defendant *Mary Hamer* or her husband.

Several sums of money were received for royalties on the produce of the mines, and on proceeding to take an account of what was due to the Defendant *Mary Hamer* for dower in pursuance of the decree on further directions, dated the 24th of July, 1846, from the death of the intestate, the Defendant *Mary Hamer* claimed to be entitled to dower out of the proceeds of the sale of the timber, and also out of the amounts so received for royalties paid under the lease; but such claim was disallowed by the chief clerk, who was of opinion that what had taken place in the suit amounted to an assignment of dower. The case now came on by the adjournment of the summons from chambers.

Mr. *Tudor* for the Defendants, in support of the claim of *Mary Hamer* to dower.

What has taken place in this suit neither is, nor is equivalent to, an assignment of dower. There has been

merely a declaration that the widow was entitled to dower. The decree does not in the usual form either direct that dower shall be assigned, or direct a commission to issue to assign dower; nor has the widow been put to her election to accept, nor has she accepted, anything in lieu of dower; *Seton on Decrees* (a); *Bamford v. Bamford* (b). Moreover, by the decree on further directions, the widow, as the receiver, was directed to pay into Court the residue of the rents, after deducting the interest of a mortgage to be created, and a sum allowed for the maintenance of the infant Plaintiff, and without retaining anything on account of her dower. This she has done, and up to the present time has received nothing on account of her dower. The widow could not assign dower to herself; *Perkins* (c).

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With regard to the proceeds of timber and poles felled pursuant to the order of the Court of the 7th of March, 1855, the case of *Bishop v. Bishop* (d) is an express authority that the widow is entitled to the interest of one-third thereof by way of dower for her life. [In answer to a question put by the Vice-Chancellor, Mr. *Kenyon* said that he could not contend that the widow was not entitled to dower out of one-third of the proceeds of the timber.]

With regard to the proceeds of the mines or royalties, if the case of the mines is to be considered as analogous to that of the timber, the widow is, upon the authority of *Bishop v. Bishop*, clearly entitled to have one-third thereof set apart each year, and to receive the income arising therefrom during her life.

(a) Pages 133, 331, 332
 (2nd edit.)
 (b) 5 Hare, 203.

(c) Sects. 45, 452.
 (d) 10 L.J., Ch. 302, N.S.;
 5 Jur. 931.

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In the case of the mines, however, the widow is entitled to more; viz., to one-third of the proceeds or royalties for her life.

As a general rule, a widow is entitled to dower of all the rents and profits of land of which her husband was seised for an estate of inheritance. Amongst the profits of land must be reckoned the proceeds of coal mines, and if they had been opened previously to the death of the husband, the widow would clearly be dowable of one-third of the proceeds; *Stoughton v. Leigh* (a); *Hoby v. Hoby* (b). In this case it is immaterial that the mines were not opened at the death of the husband, inasmuch as no assignment of dower has taken place, and the widow has accepted nothing in lieu of dower. Dower must in fact be assigned with reference to the state of things at the time of the assignment, and not with reference to the state of things at the time of the death of the husband. The time for determining what are the profits of the land out of which the widow is dowable is the time of the assignment. In the analogous cases of improvements effected on the land, as by draining or building, the widow is entitled to dower of the land in the state it is in at the time of the assignment of dower. Thus it is laid down by Lord *Coke*, that "if the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, [and] the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time, for her title is to the quantity of the land, viz., one just third part. And the like law it is if the heire improve the value of the land by building: and on the other side, if

(a) 1 Taunt. 402, 409.

(b) 1 Vern. 218.

the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband ;" *Co. Lit. (a)* ; *Roper's Husband and Wife (b)* ; *Bright's Husband and Wife (c)*. Even in the case of the alienation of land by the husband, if the land be improved by the alienee's building thereon, the widow is entitled to have a third in value of all the lands, estimating the value as at the time of the assignment, and not merely at the time of the death of the husband. In *Doe d. Riddell v. Gwinnell (d)*, Lord *Denman* says: "The right of dower unquestionably attaches on all the lands of which the husband was seised during the coverture, and as certainly attaches at the period of his death. If, indeed, the assignment of dower be postponed, the value must be taken at the period of assignment. And, as the sheriff, in case of any dispute, is the appointed judge for dividing the land by metes and bounds, it is difficult to see how that duty can be performed at any other time." *Bright's Husband and Wife (c)*.

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It may be argued that as in *Bishop v. Bishop* it was held that the widow was dowable only of the interest of one-third of the proceeds of the timber, the same mode of estimating dower should be used in the case of mines, and it may be said that both cases proceed upon the same principle, namely, that the timber when felled, and the coals when gotten from the mines, are part of the inheritance. There is, however, no analogy between the cases. When mines are once opened by the owner of the inheritance they become part of the profits of the

(a) Page 32 a. (c) Vol. 1, pp. 385, 386.
 (b) Vol. 1, p. 349 (edit. by (d) 1 Q. B. 692.
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estate, but that is not the case where the owner of the inheritance fells part of a wood. If, for instance, he were to begin to fell a wood which on his death was assigned to his wife for dower, she could not continue to fell the trees, it would clearly be waste for her to do so. If, however, he had opened a mine, she could continue to work that, because her husband had by opening it made it, or the working of it, part of the profits of the estate. This is the reason given in *Viner v. Vaughan* (a) by Lord *Langdale*, M. R., for an ordinary tenant for life being allowed to continue the working of open mines. Apply that reasoning to this case. Previously to the assignment of dower, mines had been opened by the heiress-at-law. She, being the owner of the inheritance, had, subject to the widow's right to dower, full power to open or let such mines; she thereby made the proceeds part of the profits of the estate, and, as has been before shown, the time for ascertaining out of what the widow is dowable is not the death of the husband, but the time at which dower is assigned.

The case of *Stoughton v. Leigh* is not an authority against this proposition, for there, although the Court was of opinion "that the widow was not dowable of any of the mines or strata which had not been opened at all," the question was not determined which is raised in this case: and that branch of the case of *Stoughton v. Leigh* only decides that where, at the time when dower is assigned there are mines which have not been opened at all before the assignment of dower, they cannot be taken into consideration: but here the mines have been opened before the assignment of dower.

If part of the land containing a mine opened by the

(a) 2 Beav. 466.

heiress-at-law were assigned to the widow, she might, as an ordinary tenant for life, continue to work it; *Saunders's Case* (a); and so she is entitled to one-third of the proceeds of a single mine.

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The heiress has demised the minerals under all the estate, and it would be a great hardship to the widow if she is held not to be entitled to dower out of the royalties of the mines, because by opening them, to use the words of Lord *Denman* in *Doe d. Riddell v. Gwinnell* (b), "the land has been occupied and obliterated, making an assignment of it impossible, and destroying the very means of ascertaining its independent value."

The rental moreover of the land, which is only let to a tenant from year to year, will doubtless be diminished by the working of the mines and the operations on the estate connected with them.

The widow having before an assignment of dower no estate in the land, joined in executing the lease merely as guardian and to enable the infant Plaintiff to grant such lease, and she did not thereby prejudice her right to dower. Moreover, if she had intended to do so, the lease would have been ineffectual for such purpose, inasmuch as it is not acknowledged, and at the time she executed it she was under coverture.

Mr. *Kenyon* for the infant Plaintiff.

Admitting that the widow is dowable out of the proceeds of the timber, the cases of the proceeds of timber and of mines proceed upon an entirely different principle. A tenant for life is entitled to the shade and fruit of timber standing upon the estate, and upon his fore-

(a) 5 Co. 12.

(b) 1 Q. B. 694.

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going the benefit, the Court would, upon ordering timber to be felled, give him a life interest in the proceeds, although if he had felled it himself or it had been blown down, he would not have been allowed to derive any benefit from it; *Tooker v. Annesley* (a); *Waldo v. Waldo* (b). It is otherwise as to mines; as a tenant for life is impeachable for waste if he opens mines, so, a dowress is not entitled to any benefit from them.

In this case, it will be observed, the widow is merely party to the lease as guardian, there is no grant by her; and all the covenants are either by or with the infant, and all the rents and royalties are reserved to the infant. The right of the widow springs from her husband, her estate is a continuation of her husband's, it takes effect from his death, and is a life interest in a third of the estate, subject to impeachment for waste. The minerals descend to the heir, and the widow upon an assignment of dower is entitled only to the surface, and if the heir could work the mines under the land assigned to the widow for dower he might do so; *Humphreys v. Brogden* (c).

The widow's right of quarantine is for forty days, and during that time dower ought to be assigned to her; *Bracton* (d). The widow ought to have applied to the lord for an assignment of dower.

The mines were not profits of the estate in the time of the husband, and therefore his widow is entitled to nothing from them; *Doe v. Gwinell* (e); *Whitfield v. Bewitt* (f).

Mr. Tudor replied.

(a) 5 Sim. 235.
 (b) 12 Sim. 107.
 (c) 12 Q. B. 739.

(d) Page 96.
 (e) 1 Q. B. 695.
 (f) 2 P. Wms. 240.

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No case has been cited governing the present; there is only a dictum in a text-book that can be considered as an authority at all bearing on the question now before me; and I assume that no other can be cited, having regard to the research and industry which has been exhibited by the learned counsel.


It appears that this land has mines under the whole of it. Now, supposing that after the intestate's death the widow's dower had been actually set out by metes and bounds, I apprehend she would be tenant for life of that portion, with remainder to the heir; at all events the heir would be owner in fee, subject to the dowress's life interest. What, then, would in that case be the rights of the dowress and the heir respectively with respect to mines under the portion so set out by metes and bounds? Of course I mean unopened mines, because as to those opened in the lifetime of the husband, I apprehend, there would be no question. Could the dowress open mines on that portion? Though there is not any precise authority on the point, it appears to me that the dowress is in the position of a tenant for life of that portion of the land. Now a tenant for life of land cannot himself open mines, but, on the other hand, the tenant for life has a right to say that the remainderman shall not open mines. And I do not see why the dowress would not be in the same position. If the heir, obtaining the consent of the dowress for the purpose, were to open mines upon the portion set out by metes and bounds, or to grant a lease of them, the dowress could not afterwards insist that she was entitled to a third of the profits of the mines, or a third of the rents reserved by the heir in the lease. What, then, are the circumstances here?

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There has been no assignment of dower at all. That has taken place which takes place in the great majority of cases. Instead of the old-fashioned practice of assigning of dower, the parties have gone upon the footing of the dowress receiving one-third of the income of the whole estate and the heir the rest. Of course such an arrangement is for the benefit of all parties. The heir being still an infant, a suit was instituted by the infant, by her next friend, against her mother the dowress for the purpose of administering the father's estate. In the course of those proceedings, when the cause came to a hearing, a decree was made which *inter alia* directed an inquiry to the master whether the Defendant Mrs. *Hamer* was entitled to dower out of any and which of the real estates of the intestate *Stephen Dickin*, and it was ordered that the master should inquire and state to the Court whether it would be fit and proper that the whole of such real estate, or any or what part thereof, should be let for coal mines. In pursuance of that decree the Master made a general report finding that the widow was dowable of all the real estates, but the parties waived the inquiry as to letting the mines. A decree was made on further directions in 1846, and Mrs. *Hamer* (then Mrs. *Dickin*) was appointed receiver of the real estates during the minority of the Plaintiff; she was to retain certain sums, and she was from time to time to pay the residue into the bank, with the privity of the Accountant-General, to the credit of the cause, the account of the infant Plaintiff *Elizabeth Sarah Dickin* (a very important direction); and it was directed that the Master should prosecute the inquiry directed by the decree with respect to leasing the estate for coal mines. Nine years after a provisional agreement was made with some stranger for a lease of the mines under the land, but the

Master made no report on the propriety of leasing till the 23rd of *April*, 1856, when he made a report by which he found that it would be fit and proper that the whole estate should be let for coal mines. On the 8th of *May*, 1856, an order was made approving of the provisional agreement for a lease, and directing that the agreement should be carried out by a lease to be settled in chambers.

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The lease as settled was in this form. It was made between the infant Plaintiff of the first part, Mr. and Mrs. *Hamer* (Mr. *Hamer* being the second husband) of the second part, and the lessees of the third part. The lease recites that the Plaintiff is an infant, the only child and heiress at law of *Stephen Dickin*, and entitled in fee simple to the lands, and that shortly after the death of her father she had instituted this suit; that Mrs. *Dickin* was appointed guardian; that in 1845 a decree was made for an inquiry as to the mines; that in 1846 Mrs. *Dickin* was appointed receiver; that she had intermarried with Mr. *Hamer*; that the Chief Clerk had made his certificate finding the above facts, that in the lease of the mines there was to be a certain restriction as to the dwelling-house; and that the attempts to find coal had been successful. By the operative part the infant grants, demises and leases, and Mrs. *Hamer* as such guardian (and, it is to be observed, only in the character of guardian) with the consent of her husband, grants, demises, leases and confirms, to the lessees all the mines, reserving to the infant the rents and royalties payable to the lessees. The covenants are all with or by the infant, and none with or by Mr. or Mrs. *Hamer*. The question then is, in what light I am to regard what has taken place with respect to the lease thus settled by the judge in chambers. Am

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I to regard it in the same light as if the dowress and the heiress, each insisting that the other should not work the mines without her consent, had come to an arrangement that they should be worked for their mutual benefit? It appears to me that I cannot regard what was done in that light. The whole matter proceeded on the supposition that what was done was done by the infant, and for the benefit of the infant and of no other person; and the Court acted upon the assumption that, with the concurrence of the dowress, the mines were to be let exclusively for the benefit of the infant. Mrs. *Hamer*, the dowress, being before the Court, if the granting of the lease of the mines was intended to be a matter of arrangement between herself and the heiress for their mutual benefit, she would have taken care that what was done should be effected in a very different manner from that which was adopted. Although she joined in the lease, she did so not in respect of any right of her own, but only in her character of guardian of the infant, and she did not join in the covenants. Everything that was done was regarded by the Court and by all parties as being done exclusively for the benefit of the infant. Under these circumstances I am of opinion that Mrs. *Hamer* is not entitled to any benefit resulting from the letting of these mines. If it had been the simple case of the dowress and heiress coming to the Court before any of these proceedings had been taken under the authority of the Court, there might have been a fair question; but what has been done in the suit, as it appears to me, precludes the dowress's claim. In any case I am of opinion that the utmost the dowress could have claimed would have been one-third of the income of the proceeds arising from the royalties, and not one-third of the corpus. As the matter stands, the whole benefit of working

these mines belongs exclusively to the infant, and Mrs. *Hamer* is not entitled to dower out of them.

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~
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By an order subsequently made on further consideration dated the 10th of July, 1860, it was declared that the Defendant *Mary Hamer* was not entitled in respect of her dower to any benefit from the rents and profits of the mines or minerals opened and gained respectively since the decease of her late husband, the intestate *Stephen Dickin*; and that until an assignment should be made to the said Defendant *Mary Hamer* in respect of her dower, she was entitled by way of dower to one-third of the clear net yearly rents and profits of the real estate, exclusive of the rents and profits in respect of the said mines and minerals, but inclusive of any rent which might be paid by the lessees of the mines for any portion of the surface of the estate which might be occupied or used by them. And it was declared that the Defendant *Mary Hamer* was entitled in respect of her dower to one-third of the yearly income which had arisen or might arise from the amount of the purchase-money received for timber cut and sold under the direction of the Court.

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July 10, 11,
12, 24.

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*Covenant to
settle after-
acquired Pro-
perty. Settle-
ment.*

ARCHER v. KELLY.

THE question which arose in this case was, whether a contingent remainder in certain real estate and a one-third share in two sums of stock, to which *Jane Rashleigh* was entitled at the date of her marriage with the Plaintiff *Charles Harward Archer*, came within the terms of a covenant to settle after-acquired property contained in the marriage settlement, neither the real estate nor the stock being mentioned in the settlement.

Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them in right of the wife, should "by gift, descent, succession or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture.

Held, that the words "become entitled" imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of the coverture; and therefore that the wife's interest in the real estate having changed during the coverture it fell within the covenant; but that the wife having been absolutely entitled to the two sums of stock at the date of the marriage, and there having been no subsequent change in her interest, those sums of stock did not come within the terms of the covenant.

executors and administrators, and each of them doth hereby separately for himself and herself, his and her heirs, executors and administrators, covenant with the said parties hereto of the fourth part, their executors and administrators, that if at any time or times during the said intended coverture they the said *Charles Harvard Archer* and *Jane Rashleigh*, or either of them in her right, shall, by gift, descent, succession or otherwise howsoever, become entitled to any real or personal estate, property or effects of the value or to the value of 500*l.* or upwards, at any one time, other than and except interests which shall be restricted to the life of the said *Jane Rashleigh*, then and in every such case the same shall be forthwith, at the costs of the said trust estate, conveyed, transferred, assured and paid to the trustees or trustee for the time being of these presents, upon such trusts as are herein expressed, declared and contained of and concerning the said bank annuities and premises hereinbefore assigned by the said *Jane Rashleigh*, or intended so to be."

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It appeared that at the time of the marriage of *Jane Rashleigh* a freehold estate called *Fieldings* stood limited upon trust for *Henry Hinxman* for life, and after his decease upon trust for his sons who should attain the age of twenty-one as tenants in common in fee, and in default of such issue upon trust for *Caroline Rashleigh* (the mother of *Jane Rashleigh*) for life, with remainder in trust for her children (other than her eldest son) who should attain twenty-one, or being daughters should marry, as tenants in common in fee. *Caroline Rashleigh* died in 1842, leaving four children, of whom *Jane Rashleigh* was one; and at the date of her marriage with the Plaintiff, *Jane Rashleigh* was entitled in remainder,

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contingent on the death of *Henry Hinxman* without male issue, to a one-third share in the *Fieldings* estate.

Henry Hinxman died in April, 1854, without male issue, and thereupon Mrs. *Archer* became entitled in possession to a one-third share in the *Fieldings* estate.

Jane Rashleigh was also at the date of the settlements entitled in possession to a one-third share in two sums of 3,000*l.* and 7,630*l.* Consols. Neither the one-third share in these two sums of stock, nor the one-third share in the *Fieldings* estate, was mentioned in the settlement.

Mrs. *Archer* died in October, 1854, leaving *Caroline Rashleigh Archer*, her only child, an infant.

At the time of the marriage it was supposed that *William Rashleigh*, the father of *Jane Rashleigh*, had a life interest in the two sums of stock; and upon the death of *William Rashleigh* in 1856, a one-third share in these sums of stock was, with the consent of the Plaintiff *Charles Harward Archer*, transferred into the names of the trustees under the marriage settlement of 1845.

Questions having arisen as to whether Mrs. *Archer's* one-third share in the *Fieldings* estate and in the two sums of stock were included under the terms of the covenant contained in the settlement, the present suit was instituted by Mr. *Archer* for the purpose of deciding those questions.

Mr. *Baily* and Mr. *N. Smart*, for the Plaintiff *Charles Harward Archer*, submitted that the wife's in-

terest in the *Fieldings* estate, being at the time of the marriage only a contingent remainder, liable to be defeated and falling into possession during the coverture, came within the operation of the covenant contained in the settlement. The two sums of stock, however, stood in a different position, as being the absolute property of the wife at the time of the marriage, they could not in any sense be regarded as property to which either the husband or wife "became entitled" during the coverture, so as to make them come within the operation of the covenant, and the husband was therefore absolutely entitled to it as his wife's administrator.

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Mr. *R. W. Forster*, for the infant child of the marriage, contended, that the two sums of stock, as well as the *Fieldings* estate, came within the terms of the covenant. The covenant contemplated the husband's becoming entitled in right of his wife; and it was during the coverture that this right accrued to the husband; *Grafftey v. Humpage* (a); *James v. Durant* (b).

Mr. *Glasse* and Mr. *Ware* appeared for the trustees of the settlement.

Mr. *Baily* in reply.

The following cases were also cited :—*Wilton v. Colvin* (c); *Atcherley v. Du Moulin* (d); *Ex parte Blake* (e); *Seymour v. Lucas* (f); *Hoare v. Homby* (g); *Wilcox v. Smith* (h); *Otter v. Melvill* (i); *Maclurcan v. Lane* (k); *Blythe v. Granville* (l).

- (a) 1 Beav. 46.
- (b) 2 Beav. 177.
- (c) 3 Drew. 617.
- (d) 2 K. & J. 186.
- (e) 16 Beav. 463.
- (f) Ante, p. 177.

- (g) 2 Y. & C. C. C. 121.
- (h) 4 Drew. 40.
- (i) 2 De G. & Sm. 257.
- (k) 7 W. R. 135.
- (l) 13 Sim. 190.

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July 24.


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By the terms of the settlement made on the marriage, *Jane Rashleigh's* reversionary interest in 4,074*l.* Consols, expectant on the death of her father, is settled in express terms; but no mention is made in that settlement of the other two sums of stock to which she was then entitled, nor of her contingent reversionary interest in the estate called *Fieldings*. The settlement, however, contains the covenant upon which the question arises, whether *Jane Rashleigh's* interest in the two other sums of stock, and her share of *Fieldings*, are to be included in the settlement.

There have been numerous decisions on this subject, and, as may be expected, the language of the covenants in the several cases varies very materially; but the object of covenants of this nature generally is to secure, for the benefit of the family, any property that may be acquired after the marriage.

Now the language in this settlement is "shall by gift, descent, succession or otherwise howsoever become entitled to." The word "become" in its usual and proper acceptation imports a change of condition, that is the entering into a new state or condition by a change from some former state or condition. The word "entitled" may mean entitled in possession, or entitled in reversion or remainder. And whereas at the time of the marriage the wife was entitled to the property called *Fieldings*, in remainder expectant on the death of a tenant for life, the tenant for life having died during the coverture, the wife thereupon became entitled in possession. And whereas at the time of the coverture her interest was contingent on the event of the tenant for life dying without a son, that event having happened

during the coverture, she has become entitled to a vested estate; there is a change in the condition of her estate or interest in the property; she has during the coverture become entitled to the property for a new estate or interest, and therefore this property falls within the terms of the covenant. The plain and natural import of the terms of the covenant has been complied with; *Jane Rashleigh* has by succession, or in some other manner, "become entitled" to the property during the coverture.

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I feel no doubt, therefore, that the one-third share in the *Fieldings* estate comes within the operation of the covenant.

The main argument turned upon the remaining portions of the property, consisting of Mrs. *Archer's* interest in the two sums of stock.

If at the time of the marriage the wife is already entitled to property in possession, so that there is no change in its condition, I confess I do not see how it can be said that she has during coverture "become entitled." It may be said, indeed, that during the coverture she *is* entitled, but not that she has *become* entitled to it during the coverture.

It has, however, been contended that the words "become entitled," refer not only to the wife's becoming entitled, but to the husband's becoming entitled in her right, and that if the wife at the time of the coverture is entitled in possession to stock, the husband, by the fact of the marriage, becomes entitled to the stock in her right, and that therefore as to him there is at the very moment of the marriage a change of condition in reference to the stock; and no doubt the two cases of

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Graffley v. Humpage (a) and *James v. Durant* (b), decided by Lord *Langdale*, are in favor of that contention.

In the case of *Hoare v. Hornby* (c), the Lord Justice *Knight Bruce* (then Vice Chancellor) said, "Upon the cases of *Graffley v. Humpage* and *James v. Durant* I desire to be understood as not expressing any opinion;" and I cannot help thinking that he did not entirely approve of them. Now it appears to me that what the parties intended was the becoming entitled by means of the wife's becoming entitled, and not the husband's becoming entitled in respect of a right which she already had. What they meant was that if the wife should become entitled to the property during the coverture, so that thereupon the husband would become entitled in her right, that property should be settled; and I may observe that if the intention of the parties was to settle not only the property to which the wife might become entitled during the coverture, but also that to which she was then entitled in possession, there seems no reason why they did not express that meaning in plain terms; it is strange that in order to express that intention they should use the language contained in this covenant; and I think no one can doubt that neither party had any idea of settling any property to which the wife was then entitled in possession, except that which is expressly mentioned. The argument in support of the contention that the two sums of stock come within the terms of the covenant is very subtle, and, if we resort to such an argument, I think it is not out of place to ask what is meant by the word "*during* coverture." The title which the husband acquires is acquired, not properly *during*

(a) 1 Beav. 46.

(c) 2 Y. & C. C. C. 121.

(b) 2 Beav. 177.

the coverture, but *eo instanti* that the coverture commences. The word "during" is nothing more than the Latin *durante*, it means after the commencement and before the termination of the coverture ; and it appears to me that in this sense the husband did not become entitled to the stock in right of his wife during the coverture.


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If we consider the effect of deciding that the stock in question came within the operation of the covenant, it is clear that it would entirely defeat the intention of the parties in a great number of settlements containing a similar covenant, for the consequence would be that every item of property which the wife might happen to be possessed of at the time of the marriage must be included in the settlement. I am quite satisfied that a construction which would involve such a consequence would be quite contrary to the intention of the parties.

I may observe that the case of *Hoare v. Hornby* (a), where, however, the language used is somewhat different from that used in this covenant, is not in favor of the construction which is here contended for on behalf of the children. In that case the father of the wife had made two wills, one of his English and the other of his American property, and neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed previously to her marriage a settlement of various descriptions of personal property, including specifically her property under the English will, but not referring to her property under the American will ; and the settlement contained a covenant that such further personal estate (if any) as should during her life become vested in, or accrue to, or be

(a) 2 Y. & C. C. C. 121.

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assignable by, her and her husband, should be assigned upon the trusts of the settlement; and this covenant was held in that case not to affect her American property. Now, if the contention in this case is to be considered sound and just, I do not see how it was possible to escape the effect of it in that case. It is quite clear that the American property had upon the marriage become assignable by the husband and wife; and the Lord Justice Knight *Bruce*, then Vice-Chancellor, came to the conclusion, even on those words, that the intention of the parties was to settle the property which might accrue to the wife during the marriage, and did not mean to comprise the property to which she was entitled to at the time of the marriage.


I am very glad of the opportunity of correcting an inaccurate impression as to the meaning of certain expressions I am reported to have used in my judgment in *Wilton v. Colvin* (a). In *Maclurcan v. Lane* (b), the Vice-Chancellor *Stuart*, when referring to the case of *Blythe v. Granville* (c), seems to have supposed that I felt a doubt whether the case of *Blythe v. Granville* was properly decided. That was the case of a reversionary interest; and the Vice-Chancellor of *England* decided that, being a reversionary interest which fell into possession during the coverture, it came within the covenant. I certainly had not the smallest intention of intimating any dissent from that decision, and, indeed, my present decision shows that I quite agree in its soundness. The observations I made referred to one part of the Vice-Chancellor's reasoning in that case, which was as follows:—"The covenant, therefore, plainly applies to the property which the wife would

(a) 3 Drew. 617.

(b) 7 W. R. 135.

(c) 13 Sim. 190.

become entitled to when the coverture took effect; the coverture was the futurity referred to; immediately on the marriage taking place, the wife became entitled to the property during the coverture." The reasoning, therefore, was, that inasmuch as before the marriage the lady was not entitled during the coverture, and after the marriage she was entitled during the coverture, this was such a change of condition with respect to her interest in the property as brought it within the operation of the covenant; and it was only from this portion of the reasoning that I ventured to express my dissent.

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I am of opinion that the stock to which the lady was entitled in possession at the date of the marriage is not affected by the covenant.

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Nov. 3, 5.

Copyholds.
Admittance of
particular
Devisee.
Executory
Devisee.
Receiver.

RANDFIELD v. RANDFIELD.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested, or by contingent remainder or executory devise, which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord of the manor he is entitled to the benefit of the admittance of the first devisee under the will.

The Court will not allow the possession of a Receiver appointed by the Court to be disturbed without the leave of the Court.

THIS petition was presented by the lord of the manor of *Dover Court-with-Harwich*, in the county of *Essex*, praying, that, notwithstanding an order made on the 20th of November, 1856, in the above cause, whereby a Receiver was appointed to get in and receive the rents and profits of the real estate of *William Randfield*, the testator in the cause, the Petitioner, as lord of the said manor, might be at liberty to enter into and upon the copyhold lands, tenements, and hereditaments formerly of the testator *William Randfield*, and to receive the profits of the same hereditaments and premises until further order.

William Randfield, the testator in the cause, by his will dated the 18th of October, 1837, gave and devised all his copyhold lands, &c., in the parish of *Dover Court* to his son *William Carr Randfield*, when he should have attained the age of twenty-one, and proceeded thus:—"But should the hand of death fall on my widow *Ann Randfield*, and my son *William Carr Randfield*, and my having no other children, or my son any issue lawfully begotten, my will is then, that should he leave a widow, that she shall receive the annual sum of 50*l.* sterling during her widowhood out of my real estates as before mentioned, the residue then to be equally divided share and share alike after payment of such legacies as I may hereafter name, the

division of property to be between my late brother *Richard Randfield's* surviving children, and my sister *Jersey Warner's* children, my sister *Rachael Squirrell's* children, my niece *Grace Beeston*, and my niece *Sarah Stuart*, they paying all my son's just debts, funeral expenses and demands, or my wife's, should she be the longest liver."

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The testator died on the 29th of February, 1844, leaving *William Carr Randfield* his only child.

At a Court Baron, held for the manor of *Dover Court* on the 12th of December, 1844, *William Carr Randfield* was admitted tenant in fee, under the testator's will, to the parcels of the manor of which the testator had been tenant.

William Carr Randfield died in 1856, having devised all his property to his wife, who instituted this suit to have it declared that she was entitled to the property given to her husband by *William Randfield's* will.

By an order made in the cause on the 20th of November, 1856, a Receiver was appointed of the real and personal property of the testator.

By a decree made by the Vice-Chancellor *Kindersley*, on the hearing of the cause on the 25th day of July, 1857 (a), it was declared that the son, *William Carr Randfield*, was absolutely entitled to the property devised by the will of *William Randfield*.

By a decree made by the Lord Chancellor *Cranworth*

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RANDFIELD
v.
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on appeal from the Vice-Chancellor's decision on the 2nd of December, 1867 (*a*), it was declared that the son took an absolute interest, subject to be divested in the events which had happened of the testator having had no other child, and of the son himself dying without ever having had a child.

This decision of the Lord Chancellor was afterwards, on appeal, affirmed by the House of Lords.

No person having come to be admitted tenant of the manor in the room of *William Carr Randfield*, the lord proceeded to seize the lands holden of the manor to which *William Carr Randfield* had been so admitted tenant.

By reason of the appointment of the Receiver by the Court, the lord of the manor was unable, without the authority of the Court, to receive the profits of the copyhold premises in question, and he accordingly presented the present petition praying that he might be at liberty to enter into and upon and to receive the profits and esplees of the copyhold premises.

It was admitted that *William Carr Randfield*, when he was admitted tenant, paid a full fine as tenant in fee, and the question was, whether his admittance enured to the benefit of those taking under the executory devise over, which had taken effect, or whether the lord was entitled to have a new admittance, and consequently a new fine, of those taking under the executory devise.

Mr. *Prendergast* in support of the petition.

(*a*) 2 De G. & J. 57.

The admittance of the son does not enure to the benefit of the executory devisee. The rule is, that where there is a devise of a particular estate, with vested remainders over, the admittance of the tenant for life is the admittance of those having vested remainders; but that where the remainders are contingent, the admittance of the tenant for life does not enure to the benefit of the contingent remaindermen. Still less can it enure to the benefit of the executory devisees.

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Contingent remaindermen are not in the seisin, and therefore are not tenants of the manor, and cannot take advantage of the admittance of the tenant for life. A devisee of a contingent remainder cannot make a valid surrender; *Doe v. Tomkins* (a); *Watkins on Copyholds* (b).

William Carr Randfield, the son, took the estate in fee, subject to an executory devise. The executory devise is not a part of the original devise, under which the son took, but is a substituted estate.

The lord, therefore, is entitled to have a new admittance, and consequently a new fine; and the Court will give him leave, notwithstanding the possession of the Receiver, to enter *quousque*.

Moody v. King (c); *Smith v. Spencer* (d); *Cruise's Digest*, title "*Devise*" (e).

Mr. *Dickenson*, for the executory devisees, and Mr.

(a) 11 East. 185.

(b) Vol. 1, p. 210.

(c) 2 Bing. 447.

(d) 4 W. R. 729.

(e) Ed. 1835, Vol. 6, p. 412.

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 v.
 RANDFIELD.

Kay, for the son's widow, who was entitled to an annuity of 50*l.*, charged on the estate, submitted, that the lord was not entitled to a new admittance and fine, but that the executory devisees were entitled to the benefit of the admittance and fine paid by the particular tenant. Executory devisees, it was true, were not in the seisin till the contingency happened; but when that contingency had happened, they were in the seisin. Where there was a series of limitations of estates to different persons, though some of those estates might be contingent, or executory, they were still only the continuation of the particular estate. [They cited *Lord Kensington v. Mansell* (a); *Glass v. Richardson* (b).]

Mr. *Prendergast*, in reply.

The VICE-CHANCELLOR.

The first question for consideration is, whether the Court should itself decide the question as to the lord's rights. The only ground upon which the lord is obliged to make the present application is, that a Receiver has been appointed; and the Court will not permit the possession of a Receiver to be disturbed by any person (although that person may have a good right), but such person must apply to the Court for leave to disturb the Receiver's possession.

Where such an application as the present is made, the Court may decide the matter in favor of the Petitioner, and order the Receiver to pay him the proper fine; on the other hand, if the Court considers that the Petitioner has no sort of right, then, I apprehend,

(a) 13 Ves. 240.

(b) 2 De G., M. & G. 658.

the Court will not allow him to resort to his legal remedy, but will itself decide the question against him, and so prevent his incurring unnecessary expense. The third alternative is, that the Court may consider it right, where there is a doubtful legal question, to give the leave asked for, and absolve the party applying from all contempt of the Court, by reason of any such proceedings.

In the present case, I must consider whether the right is clearly in favor of the lord, or whether it is clearly against the lord, or whether it is a matter open to fair doubt.

It appears to me, that the right is clearly against the lord. If I had felt any doubt on the question, I should have thought it right to give the lord leave to seize *quousque*; but it appears to me that the lord is not entitled, and that in such a case as the present, the admittance of the first taker enures to the benefit of the persons entitled under the executory devise.

According to the decision of the House of Lords, the estate was limited to the son in fee, but subject to an executory devise, in the event of the devisee dying without issue; in which case the estate was devised over. That event did happen; and the consequence was, that the fee, which was given (subject to be divested) to the first devisee, ceased to exist, and the fee became vested in the person taking under the executory devise; and therefore the result was the same as if the limitation had been to one for life, with remainder to another in fee.

I apprehend that the rule with respect to the opera-

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tion of the admittance of the first taker under a series of limitations of copyholds is, that if the owner surrenders to the use of his will, and then devises the estate in such a way as to exhaust the whole fee, all those who take the estate under that devise directly are entitled to the benefit of the admittance of the first taker. It is clear, if his estate is a vested remainder, the admittance of a person entitled to the particular estate, he paying a full fine as upon an admittance in fee, enures to the benefit of the remainderman.

Suppose, however, that the limitation had been to *A.* for life, and if *A.* left issue, then to *B.* in fee, but if not, then to *C.* in fee; that is a contingency with a double aspect; and, till the event happens, it is doubtful whether *B.* or *C.* will take the estate. Immediately on the contingency happening, when it has become certain that *B.* takes the estate, *B.* is as much in the seisin as if the limitations had been to *A.* for life, remainder to *B.* in fee. In the present case, the only difference is, that there is a devise to *A.* in fee, and upon that is engrafted an executory devise. Upon the happening of a certain event, the fee which had been in *A.* becomes vested in *B.* Until the event happens, *B.* is not in the seisin; but immediately on its happening, *B.* is in the seisin.

It has been decided, that if an estate be limited to one for life, with a contingent remainder to another, until the contingency happens, the person taking the contingent remainder is not in the seisin, and therefore cannot get admittance; at least, he cannot make a valid surrender. In the present case, I am of opinion, that, until the contingency happened, the persons in whose favor the executory devise was made were not in the seisin, and could not have made a valid surrender. That is the

effect of the decision in *Doe v. Tomkins*. But the moment the event happened, he came within the category of those persons who claim under the devise. The testator could not devise more than the fee; but he might do that either by dividing it out by way of a life estate and successive remainders; or by giving the fee in such a way that, upon the happening of a certain contingent event, it should go over to another person, and such person still claims under that particular devise. If, indeed, the fee which had been devised to a person under the will had, upon his death, gone to his heir or devisee, the heir or devisee would not claim under the original devise, but comes in by reason of the death of his ancestor or testator; and therefore he must obtain admittance and pay the fine. But whether he comes in by way of remainder originally vested, or by way of remainder, which by the terms of the gift was contingent, but which has become vested by the happening of the contingency, or by way of an executory devise engrafted on an estate in fee, he comes in directly under the testator's will; and, therefore, as between him and the lord, he is entitled to the benefit of the admittance of the first taker.

I must therefore dismiss the petition, with costs.

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In the Matter of THE WINDING-UP ACTS, 1848
and 1849.

1860.
Nov. 9.

*Creditor under
Winding-up
to sue in formâ
pauperis.*

In the Matter of THE IRISH LANDS IMPROVE-
MENT SOCIETY.

Ex parte FREDERICK FRY.

Order *ex parte*
for a person
carrying in a
claim under a
winding-up to
sue in formâ
pauperis.

MR. PIGGOTT applied *ex parte* for an order that *Frederick Fry* might be permitted to sue in formâ *pauperis*.

It appeared that the *Irish Lands Improvement Society* being in the course of winding-up, Mr. *Fry* brought in two claims against the society, in Chambers, which the Chief Clerk had adjourned, to be heard before the Court. The usual affidavit as to Mr. *Fry's* being a pauper was produced. In support of the application the case of *James v. Dore* (a) was cited, in which a person who had been examined *pro interesse suo* was allowed to prosecute her claim in formâ *pauperis*, and submitted that the present was an analogous case.

The VICE-CHANCELLOR made the order.

(a) 2 Dick. 788.

POLLARD v. DOYLE.

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1860.
Nov. 10, 12.

*Costs. Trustee
Solicitor.
Creditor.*

THIS was a motion to vary the Taxing Master's certificate.

The suit of *Pollard v. Doyle* was instituted in 1849, by a judgment creditor of Mr. *Macdonald*, in the name of Mrs. *Pollard*, as the executrix and universal devisee of Mr. *Macdonald*, to set aside as fraudulent and void as against his judgment two deeds which had been executed by Mr. *Macdonald* conveying to Mr. *Charles Doyle*, the uncle of the Defendant, certain leasehold property in the *Isle of Dogs*.

Mrs. *Pollard*, the Plaintiff, died soon after the commencement of the suit, having by her will appointed Mr. *Kearns*, who was a solicitor, her sole executor and universal devisee, and directed him, if he ever succeeded in obtaining the necessary documents relating to the *Isle of Dogs* property, to prosecute the suit and sell the property for his own benefit.

Mr. *Kearns* having found the necessary documents, and having taken out administration with the will annexed to the estate of Mr. *Macdonald*, revived the suit in his own name as Plaintiff.

By a decree made in the cause on the 25th of April, 1855, it was ordered that the leasehold premises should be made available, and be applied in the first place, (after paying certain costs mentioned in the order, in-

The rule, that a solicitor trustee acting in the trust shall not be allowed profit costs, is not restricted to cases of express trust; but applies to the case of an executor or trustee, though there be no express trust.

Profit costs disallowed an executor who had acted as his own solicitor, upon an objection taken by a creditor who was a party to the suit.

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cluding the costs of Mr. *Kearns* as Plaintiff,) to discharge the amount due on the judgment debt; and that the Plaintiff *Kearns* should proceed to sell the property; and it was ordered "that it be referred to the proper Taxing Master of this Court to tax the costs, charges and expenses of the Plaintiff *W. M. Kearns* as administrator with the will annexed, of the testator *J. Macdonald*, in the pleadings mentioned, and as executor of Mrs. *A. Pollard*, the administratrix with the will annexed of *J. Macdonald*," as between solicitor and client.

Under this decree the property was sold, and the purchase-money paid into Court. The proceeds of the sale proved deficient, being little more than sufficient to cover the costs of the suit.

Upon the taxation of the Plaintiff's costs, objections to Mr. *Kearns* being allowed costs as between solicitor and client, or in fact any other than costs out of pocket, were raised by the judgment creditor on the ground that Mr. *Kearns*, standing in the position of trustee for the judgment creditor, was not entitled to charge any profit costs. The Taxing Master, after conferring with all the other Taxing Masters, overruled these objections, on the ground that Mr. *Kearns* was not a solicitor trustee within the cases, and in his taxation allowed Mr. *Kearns*' full costs as between solicitor and client.

The present motion was for the purpose of varying the Taxing Master's certificate in this respect.

Mr. *Bazalgette* and Mr. *Rowcliffe*, for the judgment creditor, in support of the motion.

A solicitor, who as a trustee institutes a suit, cannot recover more than costs out of pocket; and this rule

applies not only to express, but also to constructive trustees.

Mr. *Kearns* acted as administrator not only of Mrs. *Pollard*, but also of Mr. *Macdonald*; and as such he is a trustee of the judgment creditor, and being in this position, the Court will not allow him profit costs; *Broughton v. Broughton* (a); *Matthison v. Clarke* (b); *New v. Jones*, reported in a note to *Cradock v. Piper* (c); *Lincoln v. Windsor* (d); *Fraser v. Palmer* (e); *Burge v. Brutton* (f); *Armstrong v. Storer* (g).

Mr. *Glasse* and Mr. *Southgate*, for Mr. *Kearns*, in support of the Taxing Master's certificate.

The rule preventing solicitors who are trustees from obtaining more than costs out of pocket, applies only to express, and not to constructive trustees; and all the cases cited on the other side are cases of express trusts. Mr. *Kearns* stands in the position of an executor, and is not a trustee for creditors, an executor being able to plead the Statute of Limitations against creditors, while a trustee cannot plead it as against his *cestuis que trust*.

It is not competent for a creditor to raise an objection like the present. If it were, the common clause, that a trustee acting as a solicitor in the trusts shall be allowed his full costs, would be a nullity; as that provision can only bind the *cestuis que trust*, and not creditors, and it would be competent for any creditor to prevent a soli-

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| (a) 2 Sm. & Giff. 422; | (d) 9 Hare, 158. |
| S. C., 5 De G., M. & G. | (e) 4 Y. & Coll. Ex. R. |
| 160. | 515. |
| (b) 3 Drew. 3. | (f) 2 Hare, 373. |
| (c) 1 M. & G. 668. | (g) 14 Beav. 535. |

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citor, who has for years been acting as solicitor in the trust, under such a clause, from obtaining more than costs out of pocket. Where an estate which has been recovered by means of a suit proves deficient, the Court is in the habit of allowing the Plaintiff his costs of suit before other creditors are paid.

The order for taxation being for costs as between solicitor and client, the Taxing Master could only tax strictly where the solicitor is an express trustee.

Douglas v. Archbutt (a); *Goldsmith v. Russell* (b);
Brown v. Butter (c); *Larkins v. Paxton* (d).

Mr. *Bazalgette* was not called upon for a reply.

THE VICE-CHANCELLOR.

There is no question as to the general rule that the Court will not allow a solicitor, who is a trustee acting as solicitor in the trust, more than costs out of pocket; and the only question is, whether the present case comes within that rule.

When Mrs. *Pollard* filed the bill in the first suit, though she was both executrix and residuary legatee, she filed it in her character of legal personal representative of Mr. *Macdonald* only; and if she had not been residuary legatee, she would not have made the residuary legatee a party to the suit. Upon the death of Mrs. *Pollard, Kearns*, whom she had appointed her executor, proved her will; and in order to constitute himself the

(a) 2 De G. & J. 148.

(c) 21 Beav. 615.

(b) 5 De G., M. & G. 547,
 556.

(d) 2 Beav. 219.

legal personal representative of Mr. *Macdonald*, took out administration to *Macdonald's* estate; and when he revived the suit he revived it precisely in the same character as that in which Mrs. *Pollard* had instituted it, namely, as the legal personal representative of *Macdonald*.

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The question then comes to this, whether an executor who files a bill against a stranger to recover assets as against that stranger, and in the suit acts as his own solicitor, can, as against the persons for whom he is a trustee, and for whose benefit he has recovered the property, charge more costs than costs out of pocket. If the *cestuis que trust* are not parties to the suit, of course the question does not arise. But Mrs. *Pollard*, for some reason or other, made this creditor a party to the suit; and the suit, as revived by Mr. *Kearns*, treats him as a proper party, as being a person who has a beneficial interest. I think, therefore, that Mr. *Kearns* must be considered as standing in a fiduciary character to a person in such a position.

It has been suggested that the rule applies only to cases of express trust declared by deed or wills. It appears to me that there is no reason why the rule should be restricted to cases of express trust; and I think that it applies equally to an executor or trustee, though there be no express trust.

It turns out that the fund is not sufficient to pay the judgment debt in full; and therefore the funds belong to the judgment creditor, and the residuary legatee gets nothing. It is clear that the residuary legatee of *Macdonald*, if he had not been the same person as the legal personal representative, would be entitled to contend

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that *Kearns* should only be allowed costs out of pocket.

It appears to me that the executor, standing in a fiduciary character, comes within the general rule, and is not entitled to profit costs.

Nov. 8, 13.

Injunction.
Ancient Lights,
Alteration of.

WILSON v. TOWNEND.

A Court of Equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property; and the jurisdiction of the Court is not confined to restraining injury to the enjoy-

THIS was a motion for an injunction, to restrain the Defendant from proceeding with the erection of an addition at the rear of his house, No. 6, *Eastern Terrace, Brighton*, so as to interfere with the access of light and air to the Plaintiff's houses, Nos. 5 and 7, in the same terrace.

On the 3rd of May, 1860, the Plaintiffs, Mr. *Wilson* and Mr. *Stoddard*, jointly purchased two freehold houses, No. 5, and No. 7, *Eastern Terrace, Brighton*, for the sum of 10,950*l*. At the same sale the Defendant *Townend* purchased the house numbered 6, to the enjoyment and comfort in the *occupation*: therefore it is not necessary that a Plaintiff filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property.

Where a Plaintiff filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with his windows, which he alleged were ancient lights, some of which had been recently enlarged, and some new lights had been opened, and an interim order had been granted; upon a motion for an injunction, the Court gave the Plaintiff liberty to bring an action at law, but allowed the Defendant to proceed with the new building to a specified height, on his undertaking to abide by any order the Court might make as to pulling down any addition which might be made to the erection complained of by the bill, and also undertaking to admit at the trial that the erection had been carried to such specified height.

Form of order.

The case of *Renshaw v. Bean* (18 Q. B. 112) commented on.

in the same terrace, and which was situated between the two houses purchased by the Plaintiffs.

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The Defendant, on the 6th of July, 1860, contemplating erecting an addition at the rear of his house No. 6, wrote a letter to the Plaintiff *Wilson*, stating his intention and suggesting that he and the Plaintiffs might work together, if the Plaintiffs intended making any addition to their houses. The Plaintiff *Wilson*, in reply to this letter on the 7th of July, 1860, wrote to the Defendant, telling him that the Plaintiffs had no intention of enlarging their houses, which had been purchased for an investment, and that he did not intend personally to occupy either of the houses.

The Defendant commenced erecting an addition at the rear of his house No. 6, such erection being intended to extend 26 feet 7 inches from the back wall of the house which faced towards the north, and was intended to be carried up to within about 5 feet from the top of the house. The houses being each only 29 feet wide, this new erection was distant only 5 or 6 feet from the dining and drawing-room windows of the plaintiff's house No. 5, and 13 or 14 feet distant from those windows of the Plaintiff's house No. 7; and it appeared that the dining and drawing-room windows of those houses projected 2 feet 10 inches in a bow from the back wall of the house.

It was alleged by the Plaintiffs, that the windows at the rear of their houses were ancient lights; but it appeared from the evidence, that some of the back windows of the house had been altered, so as to lower them two feet, and that some new windows had been opened.

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A considerable amount of evidence of architects, builders, &c., was adduced on both sides, as to the effect the erection would have on the access of light and air to the Plaintiffs' houses : the Plaintiffs' witnesses asserting that the Plaintiffs' houses would be diminished in value to the extent of 1,000*l.* or 1,500*l.* ; and the Defendant's witnesses alleging that the Plaintiffs' houses would be but immaterially, if at all, affected by the erection.

The erection had already been carried to a considerable height when an interim order was granted, restraining the Defendant from further proceeding with it.

Mr. *Glasse* and Mr. *C. Browne*, in support of the motion.

Mr. *Baily* and Mr. *Archibald Smith*, for the Defendant, contended that even supposing the Court would grant an injunction restraining any interference with the enjoyment and comfort of a person in the occupation of a house, still the Court would not interfere in a case like the present, where it was admitted that the Plaintiffs had purchased the houses as an investment, and not with any intention of occupation, and when, therefore, it was a mere question of money value ; that the Plaintiffs, having altered some of their windows in the house No. 5, had thereby suspended their right to bring an action for damages, and therefore could not come to a Court of Equity for an injunction ; and that the Plaintiffs knew in July, 1860, of the intended alterations, and had acquiesced in them. They cited *Attorney-General v. Nichol* (a) ; *Renshaw v.*

(a) 16 Ves. 338.

Bean (a); Cawkwell v. Russell (b); Fishmongers' Company v. East India Company (c).

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Mr. Glasse in reply :—

There is no rule that this Court will only grant an injunction to prevent interference with the enjoyment and comfort in the occupation of a house. The Court will interfere to prevent an injury being done to the property. Where ancient lights have been enlarged, the owner of an adjoining house cannot disturb the light and air of any portion of the space occupied by the ancient lights, although a greater portion of light and air is admitted by the enlarged window; *Chandler v. Thompson (d)*.

[The VICE-CHANCELLOR expressed his opinion, that the proposed erection would interfere with the access of light and air to the Plaintiffs' house No. 5; and that the Plaintiffs had not so acquiesced in it as to disentitle them to relief; but reserved his opinion on the other two objections raised by the Defendant.]

The VICE-CHANCELLOR.

In this case I reserved my opinion upon two points, which were raised by the Defendant.

Nov. 13.

The first point is this: the Defendant insists that, although the Plaintiffs might be entitled to the assistance of the Court in respect of the nuisance if the Plaintiffs themselves occupied the house, and so the

(a) 18 Q. B. 112.

(b) 26 L. J., Ex. 34.

(c) 1 Dick. 163

(d) 3 Camp. 80.

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nuisance affected their personal comfort and convenience, yet it appeared, on the face of the bill, that it was not the intention of the Plaintiffs to occupy their houses or either of them, and that they had purchased the property merely as an investment; and it was contended that therefore the Court ought not to interfere, inasmuch as the only injury the Plaintiffs could sustain was diminution of the value of their property, for which compensation could be recovered at law. Now I confess, when that objection was started, I was at first much impressed by it; and at one time the inclination of my opinion was in favor of the objection. No doubt the origin of the jurisdiction in cases where the assistance of this Court is asked for protection against a nuisance, and where the nature of the nuisance is the blocking up the passage of the light into ancient windows, is the interference with the personal comfort and convenience of the persons occupying the house which has those ancient lights. Upon further consideration, I am of opinion that the objection ought not to prevail.

If the objection were allowed to prevail in such a case as the present, it must equally prevail in the most extreme case. Suppose it happened that the Plaintiff's house, in which he did not himself reside, stood upon the very verge of his own ground; and the Defendant, whose ground came up to the very wall of the Plaintiff's house, built a dead wall within six inches from the whole of the Plaintiff's windows, and so completely blocked up all his lights, I confess I should feel very great difficulty in saying, in such a case, that this Court would tell him to go to law and get damages, and refuse to interfere itself. But further, I do not see how the line could be drawn so as to distinguish those cases in which

the party complaining has acquired the house, not then intending to reside in it himself, and those cases in which he may intend to reside in it. A person may buy a house, not at the time intending to reside in it, but his then intention would not prevent him, at any time afterwards, making it his own personal residence. A man may buy a house which has a lease upon it, and therefore he cannot become the occupant till the lease expires. He may, perhaps, not have any present intention of afterwards occupying the house; but how can I say, in such a case, that, because there is no present interference with his personal comfort and enjoyment, he is not to have that remedy which the Court gives in cases of nuisance, when it may be that he may afterwards reside in the house. He may induce the tenant to give up his lease, and he may himself become the occupant. Further, I find that, of the two Plaintiffs who are tenants in common of this property, it is only one of them (Mr. *Wilson*) who has expressed any intention on the subject. The other tenant in common, Mr. *Stoddart*, has not intimated any such intention, and, for aught I know, there may be at any time an arrangement between the Plaintiffs for either of them to take one of the houses to reside in, and, for aught I know, it may be Mr. *Stoddart's* present intention to make such an arrangement to occupy the house. When the Court has once established the doctrine that it will interfere to protect the legal right, you cannot inquire particularly whether the party who complains does or does not mean at any subsequent time himself to be the occupier. And in a great number of cases this Court does interfere to prevent an injury in respect of a legal right, simply on the ground of the damage which may be produced to property; and I think that I ought not to allow this objection to prevail.

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The remaining point is this, and it is certainly a somewhat peculiar point. The Defendant says, assuming that if the windows, which are alleged to be ancient lights, continued in their original condition, the Plaintiffs might be entitled to the assistance of the Court; the windows do not, in fact, remain in their original condition; some of the old windows, as, for instance, two on the basement floor, have been increased in size, and are not therefore in all respects the same as the original windows; besides which, the Plaintiffs have cut out some entirely new windows, which are at no higher elevation from the ground than some of the old windows; and assuming that he might be restrained from blocking up the ancient lights if they remained unaltered, and no new ones had been added, yet he has a right to do that which is necessary to prevent the acquisition by the Plaintiffs of a right in respect of the new windows and the altered windows, even though in so doing he should interfere with the ancient lights.

In support of that contention, the case of *Renshaw v. Bean* (a) was referred to, which was decided upon a special case, reserved at the trial, and therefore was fully deliberated upon by the Court, and is entitled to the greatest possible weight. In one respect there is a certain degree of inconsistency in the report, between the facts as stated in the special case and the facts as stated in the judgment. The case states that the Plaintiffs, having rebuilt the house, rebuilt the walls (excepting one portion, not material to be here noticed) where they had been before, and all the windows in those walls were just where they had been before, with this exception, that as to each of them there had been some alterations in the dimensions and

(a) 18 Q. B. R. 112.

in the elevation. In fact, the new building had been raised higher than the old building; but the case expressly states that the new house did not contain any more stories than the old house had. Lord *Campbell*, in delivering the judgment of the Court, assumed that an additional storey was built at the top of the house, containing windows which were altogether new, and not being substitutes for any pre-existing windows. And, assuming that fact, Lord *Campbell* came to the conclusion that, notwithstanding *Chandler v. Thompson* (a), the Defendant had a right to prevent the light coming into the new windows, and into the unprivileged portions of the old windows, although in so doing he prevented the light coming to the privileged portions of the old windows; and the ground of it is this, that otherwise the Plaintiff would, after twenty years, acquire a new easement or privilege, which he did not before possess, in respect of those new windows, and the unprivileged portions of the former windows; and the Defendant had a right to prevent him.

Now I confess I should have felt some difficulty in reconciling that decision with the decision in *Chandler v. Thompson*, but that Lord *Campbell* expressly says the Court does not in any way mean to overrule the decision in *Chandler v. Thompson*; and he adds, "we do not mean to say that there may not be many cases in which you may obstruct the light of a new window, although you have no right to obstruct the light of that portion which formed a portion of the old window, that is, the aperture, part of the new window, which was also part of the old window." But even if the case be not reconcilable, still, as *Renshaw v. Bean* is the decision of the

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(a) 3 Campb. 80, and *Luttrell's Case*, 4 Rep. 86a.

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Court in Banco, when all the Judges of the Court gave their opinion, and *Chandler v. Thompson* is a case at Nisi Prius, of course *Renshaw v. Bean* must prevail over *Chandler v. Thompson*, and if I could be quite clear that the facts in the present case were the same as in *Renshaw v. Bean*, I should simply follow it. But even if the facts be in other respects the same, it is not the fact here that the Plaintiffs have, as Lord Campbell assumed the facts to have been in *Renshaw v. Bean*, made an additional storey at the top of the house, with new windows in it, although it is true they have made some new windows since they bought the property. Under these circumstances I shall not take upon myself to decide the legal question, but I shall do what the Court always leans to in cases where the legal right is questioned. I shall leave the matter to be decided in a Court of Law; that is, I shall leave the Plaintiffs to bring an action; and, indeed, I understood from the Plaintiff's counsel that they are perfectly willing to bring an action now.

The only question I have then to consider is, what ought to be done in the intermediate time? If the Plaintiff is right, and the Defendant's new building is built up to the intended height, the Plaintiff will have sustained great injury, from which he ought to have been protected. If, on the other hand, I stop the building in the meantime, the effect will be that if the Defendant is right, he will have sustained considerable injury. Therefore, what I think I ought to do, under the whole of the circumstances, is this, that if the Defendant is willing to undertake that he will abide by such order as the Court may think fit to make with regard to the pulling down and removing any portion of the building not yet erected, that is, which may be

erected between the present time and the time when the decision of the Court is known, I shall not interfere with the progress of the building up to the height of 2 feet 2 inches beyond its present height.

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Mr. *Glasse* submitted that the Court would require an undertaking from the Defendant to admit, at the trial, that the building had been carried to the height proposed; and to abide by such order as the Court might make as to pulling down or removing such addition to the present height; and referred to the form of order in *Sutton v. Lord Montfort (a)*.

The following was the order made :—

“ Defendant, by his counsel at the bar, expressing his intention not to carry the building, in the rear of No. 6 for the present, higher than 2 feet 2 inches beyond the height to which it is at present raised, and undertaking to abide by any order the Court may make as to pulling down any addition which may be made to the present erection complained of by the bill, and also undertaking to admit, for the purposes of the action hereinafter mentioned, that the erection has been carried to the height of 2 feet 2 inches above the present height, let the Plaintiffs be at liberty to bring such action as they shall be advised, and let the further hearing of the motion be adjourned till after the trial of the action, with liberty to apply.”

(a) 4 Sim. 565.

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Set-off.

JENNER *v.* MORRIS.

A. and his wife and children were entitled under a settlement to 1,500*l.* charged on real estate of which *B.* was tenant for life, the 1,500*l.* was the wife's property vested in trustees for the husband for life, with usual remainders. *A.* was indebted to *B.* for money advanced for the wife. Held, that on raising the charge, *B.* could not set off his claim against *A.*'s life interest.

IN this case, the Defendant Sir *J. Morris* was tenant for life of certain real estate on which a sum of 1,500*l.* was charged; this sum was a portion originally belonging to the Plaintiff, Mrs. *Jenner*, a sister of Sir *J. Morris*; but was, on her marriage, settled on Mr. *Jenner* for life, remainder to Mrs. *Jenner* for life, with the usual remainders in favor of children. Mr. and Mrs. *Jenner* had for a period lived separate, Mr. *Jenner* not making his wife any allowance, alleging that he was not bound to do so, and Sir *John Morris* had, during that period, advanced monies for her support. In this suit, which was by Mr. and Mrs. *Jenner* and their children for raising the portion of 1,500*l.*, Sir *J. Morris* claimed to set off the debt due to him from Mr. *Jenner* in respect of the monies expended by Sir *J. Morris* for the wife's support against Mr. *Jenner's* life interest. Mr. *Jenner* insisted that there was no debt; but it was unnecessary to decide upon that question in consequence of the decision of the Court upon Sir *J. Morris's* right to set-off, even assuming that there was a good debt.

Mr. *Glasse* and Mr. *C. Herbert Smith*, for the Plaintiffs, insisted that there could be no such thing as set-off, even assuming there was a debt, which they denied; set-off must be between the same parties, and with cross-debts of the same kind. Here not only was the cross-demand not between the same parties, but the claims were of a different nature. The demand of the

Plaintiffs was not of a personal debt against Sir *J. Morris*, but of a charge on the whole estate, of which he was only tenant for life. Besides, the claim was by the trustees, against whom Sir *J. Morris* had no claim of debt. How could he set off his claim of debt against Mr. *Jenner*, against what belonged to the trustees.

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Mr. *Baily* and Mr. *Archibald Smith*, for Sir *J. Morris*.

It matters not that the charge, when raised, is payable to the trustees. The income, when they get it, is Mr. *Jenner's*, and the debt due to Sir *J. Morris* will be properly set off against that. Why should we be put to circuity of proceeding? Assume, for this part of the argument, that the debt is due to Sir *J. Morris*, the Court can at once direct that payment, instead of placing the money in the hands of the trustees, and then leaving us to our action against Mr. *Jenner*.


Mr. *Toller* and Mr. *Rasch*, for the trustees.

Mr. *G. L. Russell*, for other parties.

Mr. *Glasse* replied upon the case, *ultrà* the question of set-off, on which the Vice-Chancellor said he would not trouble him to reply.

THE VICE-CHANCELLOR.

The main question is this: whether as against Mr. *Jenner's* life interest, in that portion which is to be raised out of the estate, Sir *J. Morris* is entitled to

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set-off a personal demand against Mr. *Jenner*; Sir *John Morris* says, *Jenner* is his debtor in respect of monies which he, *Morris*, advanced to Mrs. *Jenner* for her maintenance and support, which *Jenner* had failed to supply her with. He says that is Mr. *Jenner's* debt, and that he, Sir *J. Morris*, is entitled to set off his debt against the interest of the portion, to which interest Mr. *Jenner* is entitled. The personal fund itself being the portion to be raised, is a portion charged on the estate, and belonging originally to Mrs. *Jenner*; and if Mrs. *Jenner* had remained unmarried, she would be entitled to have the portion raised. But it seems that this portion of 1,500*l.* has been so settled, that it is vested in trustees; and when the trustees get it, they will have to pay the income to Mr. *Jenner* for life. And if at the time when they raise it there were arrears of income, they would be the persons to receive them and pay them to Mr. *Jenner*.

[The VICE-CHANCELLOR then referred to another cause, in which Mr. *Jenner* had filed a bill to have a judgment declared a charge on Sir *J. Morris's* estate, and on which he had held that Sir *J. Morris* could set off his claim against that of Mr. *Jenner*; and pointed out that in that case there was a debt due from Sir *J. Morris*, and a debt due from Mr. *Jenner*, and that in order to ascertain what was the debt due from Sir *J. Morris*, it became necessary to take into account and to set off the debt due from Mr. *Jenner*.] He then proceeded :—

But this is quite different. The debt claimed by Sir *J. Morris* is for money paid by him for *Jenner*: a personal debt of *Jenner*. But to whom is Sir *J. Morris*

indebted? He is not personally indebted to any one, not even for the arrears of income. The claim against him is not a personal claim; it is a claim to have the portion raised out of estates of which Sir *J. Morris* is only tenant for life: it is a claim against all the remaindermen as against him. But further, if he were indebted to any one, to whom is he indebted? Not to *Jenner*; it would be a debt to the trustees of the settlement; they are entitled to both corpus and interest. They are entitled to receive the whole. Indeed, it may be, that by reason of dealings between them and Mr. *Jenner*, they are entitled to retain the whole income beneficially. Of that I know nothing, but it may be so.

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I am of opinion that there is no right to set off in this case; not merely on any dry technical ground as to the nature of the debt and the cross-debt; but on the ground that if there is a debt at all, it is a debt due to the trustees, &c. The money can only come to Mr. *Jenner* through the hands of the trustees. I think that is sufficient ground for holding that this is not a case of set-off.

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Nov. 11, 24.

*Apportionment.
Interest on
Debenture
Coupons.*

In re ROGERS' TRUSTS.

Interest payable on coupons to debentures, though payable half yearly, accrues due *de die in diem*, and is therefore subject to apportionment.

THIS petition was presented by the trustees of the will of *William Rogers*, deceased, under the 30th section of the "Law of Property and Trustees Relief Amendment Act" (a), for the advice of the Court as to whether certain dividends received by them on railway debentures after the death of their testator, but which accrued partly during the lifetime of the testator and partly after his death, though not payable till after his death, should be treated as forming part of the income or capital of their testator's estate.

William Rogers died on the 11th of February, 1859, having by his will, dated the 17th of June, 1857, given all his real and personal estate not specifically disposed of to his trustees, the Petitioners, upon certain trusts expressed in his will.

The testator, at the time of his death, was possessed of 3,000*l.*, secured by three debentures of the *Great Western Railway Company*, for 1,000*l.* each, and bearing interest after the rate of 5*l.* per cent., and of 3,000*l.* secured by three debentures of the *Midland Railway Company* for 1,000*l.* each, and bearing interest after the rate of 4*l.* 5*s.* per cent.

Each of the debentures of the *Great Western Rail-*

(a) 22 & 23 Vict. c. 35.

way Company purported to be an assignment of the undertaking of the *Great Western Railway*, and of all the tolls arising therefrom under their act, unto *William Rogers*, his executors, administrators and assigns, until the sum of 1,000*l.*, with interest for the same at the rate of 5*l.* per cent., should be satisfied, with a proviso that the principal sum should be repaid at the end of three years from the 30th of May, 1857. The principal, therefore, on them was not payable till May, 1860. To each of these debentures were attached warrants or coupons for the payment of interest half-yearly, on the 2nd of January and 2nd of July in every year.

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On the 2nd of July, 1859, the sum of 73*l.* 8*s.* 9*d.* became due for the half-year's interest on the debentures, and was received by the Petitioners.

Each of the debentures of the *Midland Railway* also purported to be an assignment of the undertaking to *William Rogers*, till the sum of 1,000*l.* and interest, after the rate of 4*l.* 5*s.*, had been satisfied, and contained a stipulation that the principal sum of 1,000*l.* should be repayable on the 7th of January, 1860, and that in the meantime the company should, in respect of the interest on the principal sum, pay to the bearer of the said coupons or interest warrants respectively the several sums therein specified. To each of these debentures coupons were also annexed for payment of the interest half-yearly, on the 1st of January and the 1st of July in every year.

On the 1st of July, 1859, the sum of 62*l.* 8*s.* 6*d.* became due for a half-year's interest on the debentures, and was received by the Petitioners.

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Questions having arisen between the tenants for life and remaindermen under the testator's will, as to whether these sums of 73*l.* 8*s.* 9*d.* and 62*l.* 8*s.* 6*d.* were income or were apportionable, the Petitioners presented the present petition for the advice of the Court.

Mr. *Whitcombe*, for the trustees, stated the point to the Court.

Mr. *Shapter* and Mr. *Eddis*, for the remaindermen, in favor of the apportionment; submitted, that the debentures were in the nature of mortgages, with a fixed time for paying off the principal, and that the interest, though only payable half-yearly, accrued *de die in diem*; so much of the interest, therefore, which accrued due during the testator's life was capital. They cited *Banner v. Lowe* (a); *Clive v. Clive* (b); *Edwards v. Countess of Warwick* (c); *Wright v. Warren* (d); *Wilson v. Harman* (e); *Ex parte Smythe* (f); *Coote on Mortgages* (g); *Williams on Executors* (h).

Mr. *Glasse* and Mr. *Fry*, for the tenants for life, submitted that the fact of the interest being payable on the coupons altered the case, the interest being only payable to the holder of the coupon, and at a fixed time. The question in cases like the present was, whether the capital could be called for at any time or not. If the capital could be so recalled, the interest on it accrued *de die in diem*, and was subject to apportionment; if not, the interest was not apportionable, and in the present case there was a stipulation that the capital should

(a) 13 Ves. 134.

(b) Kay, 600.

(c) 2 P. Wms. 171.

(d) 4 De G. & Sm. 367.

(e) 2 Ves. sen. 672.

(f) 1 Swanst. 339, n.

(g) Page 442.

(h) Vol. 1, p. 747.

not be payable till a certain fixed time. The interest, therefore, could not be apportioned, and must be treated as income. They referred to *Brown v. Amyot* (a); *Beer v. Beer* (b); *In re Clulow's Trusts* (c).

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[The VICE-CHANCELLOR reserved judgment, in order to ascertain the practice in chambers on the subject in administration suits.]

The VICE-CHANCELLOR.

This is a question which has nothing to do with the Apportionment Act (d), and would equally have arisen if that act had never passed.

Nov. 24.

The object of the Apportionment Act was to apportion as between different persons one whole and entire thing; a half-year's dividend on so much stock is one entire thing, and that act would apply to it.

In the present case, the interest payable on the debentures, though payable half-yearly, is not an entirety, but is an accumulation of each day's interest, which accrues *de die in diem*; and which, though not presently payable, is still due. The only question in my mind was, whether the practice in chambers was otherwise than to apportion such interest; but on inquiry at chambers I find that it is a matter of course to treat so much of the half-year's interest as has accrued during the life of the testator as capital.

The present is not indeed the case of a common bond, but of debentures issued under an act of parliament.

(a) 3 Hare, 173.

(b) 12 C. B. 78.

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(c) 3 K. & J. 689.

(d) 4 & 5 Will. 4, c. 22.

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The debenture is in the nature of a mortgage, to secure a certain sum of money, with interest; and there are coupons attached to the debenture, which make the interest payable half-yearly. It appears to me to stand in the same position as a mortgage; and therefore that so much of the first half-year's interest payable after the testator's death as accrued due during his lifetime, must be apportioned and treated as capital.

Nov. 22.

Exceptions.
Privileged
Communication.
Pleading.

MARSH v. KEITH.

1. Under the new practice, it is not necessary to introduce charges suggesting imagined facts to found an interrogatory; so that where a bill charged the existence of a mortgage known to the Plaintiff, but did not charge that there were others, an interrogatory, "whether there were others," was held to be correct.

THIS case came on upon exceptions to the answer of the Defendant *Keith*.

The bill stated that *Joseph Muskett* by his will devised certain real estates to *J. S. Muskett*, and directed 27,000*l.* to be raised thereout, and directed the application of the money. It then stated that the sum was afterwards reduced to 21,000*l.*, and that the estates had been advertised for sale, and that *Thomas M. Keith* was the trustee of the fund to be raised. The bill then went into various matters to show that the charge ought not to be immediately raised, and that *Keith*, the trustee, insisted on raising it; and it alleged matters to show that at any rate, if raised, *Keith* ought not to be allowed

2. A plea of privilege by the answer, alleging that the Defendant has acquired information as solicitor of *A. B.*, acting as such in relation to the matters inquired after, but not alleging that he acquired it *from the client*, is insufficient.

3. Where a bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief: *Held*, that a Defendant cannot protect himself from answering on the ground that as to one branch of the relief the bill would be demurrable, for that would be a demurrer to the whole bill.

to receive it. The bill alleged the particular charge of 21,000*l.* on the estates, but it did not charge that there were other mortgages: it prayed a declaration that the 21,000*l.* ought not to be raised until a certain stated period; and if the Court was of opinion that it ought to be raised, then it prayed in the alternative, that *Keith* might be restrained from receiving it, and that new trustees in the place of *Keith* might be appointed. *Keith* was a solicitor, and the solicitor of the other Defendant, *Muskett*. The 42nd interrogatory inquired whether there were any other, and what, charges affecting the estates devised, other than the charge of 21,000*l.*, and when the same were created.

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The Defendant *Keith* by his answers admitted the charge of 21,000*l.*, and, to the 42nd interrogatory, answered, "I submit and humbly insist that, having regard to the nature of the relief prayed in this suit, and also to the fact that my knowledge as to the matters inquired after by the 42nd interrogatory has been acquired by virtue of my employment as the solicitor of the Defendant *J. S. Muskett* in relation to such matters and from no other source, I am not bound to set forth, &c."

The case now came on upon an exception to this answer.

Mr. *Baily* and Mr. *Batten*, for the Plaintiff, in support of the exception.

First, it will be said, there is no sufficient charge in the bill, because we do not charge that there are *other* mortgages. But that is not necessary under the new practice. Then it is said the Defendant is privileged; but, in the first place, he is our trustee, and his character

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of solicitor cannot protect him; next, though he says he has acquired his knowledge *as solicitor*, he does not say he acquired it *from his client*; he may have acquired it from a stranger, and then he is not privileged; that is fatal to his plea of privilege. Then it will be argued that he is not bound to answer, because as to the matter to which he is required to answer the bill, it is said, is demurrable. But you cannot go into that upon exception. The relief prayed is in the alternative; either that it may be declared that the charge ought not to be raised, or, if it ought, then that new trustees may be appointed to raise it. The Defendant says that on the first branch of the relief prayed the bill is demurrable. Well, if it is so, that is a demurrer to the whole relief; for each alternative is the whole relief, and you cannot demur to the whole relief by answer.

They cited *Desborough v. Rawlins* (a); *Sawyer v. Birchmore* (b); *Few v. Guppy* (c); *Gore v. Bowser* (d).

Mr. *Baggallay*, for the Defendant.

1. The charge is not sufficient. It clearly was not sufficient under the old practice; *Wigram on Discovery* (e); and the new practice makes no alteration. The model form of a bill, a foreclosure bill, framed by the Judges; *Consolidated Orders* (f), contains the old charge, and the form of the interrogatory is accordingly. This is the form, therefore, laid down by the Court as proper and necessary. To inquire generally what charges there are, you ought to allege that there are charges.

(a) 3 My. & Cr. 516.

(b) 3 My. & K. 572.

(c) 13 Beav. 457.

(d) 5 De G. & Sm. 30.

(e) Section 190.

(f) Consolidated Orders,
Sched. (A).

2. The information was derived by my client in his character of solicitor, while the relation subsisted, and in relation to the matters inquired after: that is alleged by the answer. It is said, we do not allege directly that the information was obtained from the client. But, if it was not, it would not be true that we had acquired it as the solicitor of *Muskett*. If it had been acquired from a stranger, we could not say truly we acquired it as solicitor of *Muskett*; therefore the allegation involves, by unavoidable conclusion, that we did acquire it from our client. But whether we did or did not is not material. The Defendant swears he acquired it as solicitor, in his business as solicitor, being the very business inquired after; that is sufficient.

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Herring v. Clobury (a); *Jones v. Pugh* (b); *Carpmael v. Powis* (c); *Sug. Vend.* (d); *Doe v. Watkins* (e); *Volant v. Soyer* (f); *Parkhurst v. Lowten* (g); *Robson v. Kemp* (h).

In *Desborough v. Rawlins*, the business done was not that of a solicitor.

Next, the bill is demurrable, and that may be discussed on exception.

I am not demurring to the whole bill; I am demurring to answer a particular question; and I say that if that question were answered, admitting the allegation of the bill, no relief could be given. That is the legitimate effect of the 4th rule of the 15th Consolidated

(a) 1 Phil. 91.

(b) Ibid. 96.

(c) Ibid. 687.

(d) Page 639.

(e) 3 Bing. N. C. 421.

(f) 13 C. B. 231.

(g) 2 Swanst. 194.

(h) 5 Esp. 52.

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Order. He referred also to the Improvement of Jurisdiction of Equity Act (a), and *Bristow v. Whitmore* (b). My client is not concerned in the relief first asked; the question is therefore immaterial.

Mr. *Baily* in reply, was confined to the question of immateriality of the discovery by Mr. *Keith*.

How can it be said the Defendant is not concerned in the relief asked? He is the trustee of the charge; nothing can be done without him. He is connected and blended with every particle of the suit.

THE VICE-CHANCELLOR.

The first question is, whether the Defendant can protect himself on the ground of there being no allegation in the bill to support the interrogatory. There is not in the bill any allegation that there are or that there are not any such other charges, nor even that the Plaintiff does not know whether there are or are not; and the question is, whether on that ground the Defendant is excused from answering. It has been argued that the Court, in settling the new practice under the Chancery Improvement Act, did not intend to abolish the old rule by which, if the Plaintiff wanted to know what charges there were, he was bound to assert either that there were, or that there were not, such charges, and the forms in the schedule to the new Orders have been referred to. Now, no doubt, in the form of bill given in schedule (A.) to the Orders, for a foreclosure bill, there is an allegation according to the old form. But that

(a) 15 & 16 Vict. c. 86, (b) 4 K. & J. 743.
 s. 50.

allegation, according to the old fashion, is a pure fiction : the Plaintiff alleges that there are mortgages, of which he knows nothing, or that there are not mortgages ; or he alleges (supposing that would have been sufficient) that he does not know whether there are mortgages or not, which would probably be the only true statement. That was the old form ; and, *per incuriam*, that form has been retained in the model bill, and there is an interrogatory founded upon it. But we must look at the act of parliament itself, the object of which was to get rid of what I may call this sort of nonsense in the forms. [His Honor referred to the 10th sect. of the act]. Now to preserve the necessity of alleging a fiction, would be quite inconsistent with the spirit and principle of the act ; and I am of opinion, that though there is no specific allegation of there being other mortgages, there is sufficient foundation for the interrogatory.

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The next ground is, that, from what is stated in the answer, the case comes within the rule of privileged communication. [His Honor referred to the terms of the answer.] Now the Defendant says that allegation brings him within the rule of privilege. A great number of cases have been cited, more or less bearing on the question. And beyond all doubt the principle is now well established. It is this : that to entitle a solicitor to claim the privilege of his client (for it is the client's not the solicitor's privilege), he must show that the communication was a confidential communication passing between him and his client, in the relation of solicitor and client.

Whatever passes between a solicitor and his client, as a matter of professional business, the Court will consider as confidential. But it must pass between them

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in the relative characters of solicitor and client; then it is confidential; and the interests of mankind require that it should be privileged.

Does, then, this allegation come up to that point? I am of opinion that it does not. It is not said that the knowledge has been acquired by communication between the solicitor and his client, but only by virtue of the solicitor's employment as solicitor in relation to the business.

It is consistent with that statement, that the communication may have been made to the solicitor without any communication from or consultation with the client. And I am of opinion that this answer does not protect the solicitor from answering.

Next, it is said that the information sought by the interrogatory is not material to the relief asked against *Keith*, and Sir *James Wigram's* Work on *Discovery* (a) is cited. Now what is the relief asked against *Keith*? All that is asked against him specifically is an injunction, and the appointment of a new trustee. But, in truth, the whole relief sought by the bill is asked against him: It may not be hostile relief; but as trustee he is involved in the whole of the relief asked. It is true that in one sense it is immaterial whether there are other mortgages or not; but is it immaterial to the relief asked adversely against *Keith*? But still the whole relief asked is entirely in respect of the particular charge, in which *Keith* is involved as trustee; and it appears to me quite consistent with Vice-Chancellor *Wigram's* rule that he should give discovery. I am of opinion, therefore, that on that ground Mr. *Keith* is not protected.

Then it is said that the Defendant may refuse to answer because the bill is demurrable; and he refuses on two grounds. First, he says, I demur to part of the relief, because what is asked is only a declaration of right without consequential relief. It is said that no consequential relief is asked, it being contended that an injunction is not consequential relief. But it appears to me that a perpetual injunction is as much substantial relief as an order to pay a sum of money; a perpetual injunction is, in many cases, the whole decree. If an injunction were not relief, how could there be such a decree? It appears to me impossible to say that on that ground the bill is demurrable.

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Then the Defendant says, I can show that if a demurrer had been put into the bill, so far as it prays a declaration and injunction, the demurrer would be allowed. But I think that, upon exceptions, it is not the proper time or mode of going into that question. What is the nature of the bill? It relates to a charge of 21,000*l.*, in which the Plaintiff is beneficially interested. The Plaintiff says he is interested in having it remain a charge, and prays for a declaration accordingly, and an injunction to restrain its being raised. That might have been the whole relief: it would be complete relief in itself. But then if that cannot be obtained the Plaintiff asks, in the alternative, other relief. He says, if the charge is to be raised, let it be done by another trustee. The first relief asked is entirely separate and alternative; so is the other; no part of either is asked concurrently with the other. Each taken by itself is all the relief asked. Now it is argued that if there are several portions of relief asked, you may show, as ground for refusing discovery as to a particular portion, that that portion is demurrable. Is it, however, the

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fact, even if that were this case, that you may object to answer a particular question, by saying, "if I had filed a demurrer to a portion of the relief respecting which this particular question is asked, I should show the bill to be in that respect demurrable." I do not think that is the meaning of the 4th rule of the 15th Consolidated Order.

I apprehend that it has long been determined that the object of the rule was this: formerly, if you were asked a question that you had a right to object to answer, quite irrespective of the relief, you could only object by demurring and answering; and under the old practice we all know that, from the multiplicity of rules affecting that mode of proceeding, the difficulty of demurring and answering was almost insurmountable. The object of the Order was to relieve parties from the necessity of taking an objection to a particular question, which the Defendant was not bound to answer by demurrer. That was the reason of the Order, and that was the view taken by Lord *Cottenham*. I think it would be contrary to principle to give that Order any other construction.

Besides, as I have said, this is not the case of a bill being demurrable as to a portion of the relief. Here it is the whole of the relief asked in one alternative, as to which it is alleged that the bill is demurrable. And even if you could upon exceptions have the benefit of a demurrer to a part of the relief asked, that would not apply to this case.

Upon all these grounds, I cannot admit the Defendant's objection, and the exceptions must be allowed.

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Dec. 7.

Construction.
Will.
"Unmarried."

DAY v. BARNARD.

THIS was the petition of *Robert William Keate* and others, for the sale of certain sums of stock and annuities standing in Court to the credit of "the account of the Plaintiff, *Isabella Ann Ramus*," and for payment to the children and sole next of kin at the time of her death of the said Plaintiff of the monies produced by such sale.

Dame *Benedicta Day*, by her will dated the 10th of August, 1808, under and by virtue of the power given to her for that purpose by the will of her late husband Sir *John Day*, bequeathed the sums of money and other the premises included in such power to trustees, upon trust as to four-eighths thereof, to pay the interest and dividends thereof during the life of *Louisa Benedicta Ravenscroft* to such persons as *Louisa Benedicta Ravenscroft* should, notwithstanding her coverture, appoint, but not so as to anticipate the same; and, in default of such appointment, into the proper hands of *Louisa Benedicta Ravenscroft* for her sole and separate use, free from the control or engagements of her present or any future husband. And after the decease of the said *L. B. Ravenscroft*, in trust for the persons to whom *L. B. Ravenscroft* should by will give or bequeath the same, and in default of such gift or bequest, "in trust for such person or persons as at the

A fund was devised by will to *A.* for life, and after her decease to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of *A.* would be entitled to her personal estate under the Statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried.

A. subsequently married and had eight children, but died a widow, and without having appointed the fund.

Upon a petition by the children of *A.* claiming the fund—*Held*, that "unmarried" meant not

having a husband at the time of her death, and therefore that the children of *A.*, and not the persons who would have been entitled to *A.*'s personal estate if she had died without ever having been married, were entitled to the fund.

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time of the death of the Plaintiff *Louisa Benedicta Ravenscroft* would be entitled to her personal estate under the statutes made for the distribution of intestates' estates as if she had died intestate and *unmarried*, to be divided between such persons, if more than one, in the shares in which the same would, in that event, under and by virtue of the same statutes, be divisible between them." And as to two other equal eighth parts of the said trust monies, stocks, funds and securities, and the interest and dividends thereof, upon and for such and the same trusts, intents and purposes for and in favor of the said testatrix's niece the said *Isabella Ann Keate* (then *Isabella Ann Ramus*, spinster), and her next of kin, as were thereinbefore expressed and declared of and concerning the said four equal eighth parts of the said trust premises for and in favor of the Plaintiff *Louisa Benedicta Ravenscroft*, and her next of kin.

The sums in respect of which the present question arose represented the two-eighth parts bequeathed by Dame *Benedicta Day* to *Isabella Ann Keate*; that question being whether, the term "unmarried" was to be construed, without ever having been married, or being without a husband at the time of her death.

Elizabeth Ann Keate (then *Elizabeth Ann Ramus*), was married, in 1812, to *Robert Keate*, who died in 1850, and, at the time of her death, in 1859, was a widow. The Petitioners, representing her children, claimed the two-eighth parts as being the sole next of kin of *Isabella Ann Keate* under the Statutes for the Distribution of Intestates' Estates at the time of her death.

The Respondents to the petition were the persons

who would have been entitled to the personal estate of *Elizabeth Ann Keate* under the Statutes for the Distribution of Intestates' Estates if she had died intestate, without ever having been married, and they claimed the two-eighth parts of *Elizabeth Ann Keate*.

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Mr. *Baily* and Mr. *Pearson*, for the Petitioners, submitted that the term "unmarried" must be construed to mean not having a husband at the time of her death, and cited *Coventry v. Lord Lauderdale* (a); *Hardwick v. Thurston* (b); *Hoare v. Barnes* (c); *Maugham v. Vincent* (d); *Norman's Trust* (e); *Pratt v. Mathew* (f); *Mitchell v. Colls* (g); *Saunderson's Trust* (h).

Mr. *Charles Hall* and Mr. *Jones Bateman*, for the Respondents, submitted that the term "unmarried" must be construed as meaning without ever having been married. They cited—*Jarm. on Wills* (i); *Maberly v. Stroud* (k); *Thistlethwayte's Trust* (l); *Smith v. Smith* (m); *Bell v. Phyn* (n).

Mr. *Baily* was not called upon for a reply.

THE VICE-CHANCELLOR.

The question is, whether in the will in question the term "unmarried" means not having a husband at the time of her death, or never having had a husband, never having been married.

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|---------------------------|-----------------------|
| (a) 10 Jur. 793. | (g) Johnson, 674. |
| (b) 4 Russ. 380. | (h) 8 K. & J. 497. |
| (c) 3 Bro. C. C. 316. | (i) Vol. 1, p. 435. |
| (d) 4 Jur. 452. | (k) 3 Ves. 452. |
| (e) 3 De G., M. & G. 965. | (l) 1 Jur. N. S. 570. |
| (f) 22 Beav. 328; S. C., | (m) 12 Sim. 326. |
| on appeal, 4 W. R. 773. | (n) 7 Ves. 453. |

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In my opinion, the meaning of the word "unmarried" is most frequently used to mean, never having been married; at the same time, it is a term which is flexible in its meaning, and may be used in either sense, and the cases have decided that the sense in which it must be construed must be governed by the context in which it is used.

If the word in the present case means, without ever having been married, then Lady *Day*, in making the provision for Miss *Ramus*, must be considered to have intended her to have the life interest independently of her husband; and that, after her death, she should have an absolute power of disposition of the fund by her will, but that in case of her making no disposition by will, even if she left children, such children should be excluded and that it should go to her next of kin, other than her children, however remote. The improbability of the testatrix having so intended appears to me so great, that, unless there is a necessity for such a construction, the Court ought not to adopt it; and that such improbability affords good ground for giving to this flexible term the other construction.

Now if we consider the word "unmarried" to have been used by the testatrix in the sense of not having a husband at the time of death, that would have the effect of enabling the children to take as next of kin, and, at the same time, excluding the husband. And this seems most in accordance with the intention to be collected from the whole will. I see in the will no trace of a design to exclude the children; but I see clear indications of an intention to exclude the husband. The exclusion of the husband seems to be the leading object. We find that the testatrix has carefully excluded the husband from touching the income during the lifetime

of Miss *Ramus*, and by giving her no more than a life interest, with a power of disposition by will, she has excluded him from taking the corpus. The word "unmarried" ought to be so construed as to carry into effect the intention of the testatrix, which I think was to exclude the husband if Miss *Ramus* did not exercise the power, and, at the same time, not to exclude the children from taking as next of kin.

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In *Bell v. Phyn* (a), the Master of the Rolls put on the words, "without being married," the meaning, "without ever having been married," because that seemed most in accordance with the testator's intention. In the case of *Norman's Trust*, I put the same construction for the same reason. I think the leaning of the Court has been, in order to carry into effect the apparent intention of the testator, to construe the word in that sense which would enable the children to derive a benefit; and that, not only in cases where no express provision has been made for the children, but also where a certain limited provision has been made for them.

In this case, I must hold that the word "unmarried" means not having a husband at the time of her death, and therefore that the Petitioners are entitled to the fund.

(a) 7 Ves. 453.

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Dec. 7.

*Ward of Court.
Payment of
Fund in Court
to Husband.
Reference as to
Settlement.*

GYNN v. GILBARD.

Where a ward of Court, who was entitled to a fund on attaining twenty-one, married without the consent of the Court, and no settlement was made on the marriage; and afterwards, having attained twenty-one, together with her husband petitioned the Court for the payment of the fund to her husband; the Court refused to make an order for payment to the husband, but directed a reference as to a settlement.

THIS was the petition of *William Baker* and *Amelia Ann*, his wife (late *Amelia Ann Gynn*, spinster), one of the Plaintiffs in the cause, for the payment of a sum of 472*l.* 2*s.* 8*d.* stock, standing in Court to the "account of *Amelia Ann Gynn*, an infant," one of the Petitioners, to the Petitioner *William Baker*.

The suits were instituted to establish the trusts of the will of *John Williams*, the testator in the cause.

By an order made in July, 1851, on further directions, it was declared that the Petitioner *Amelia Ann Gynn*, among other persons, was entitled, upon her attaining the age of twenty-one years or marriage, to an equal share in the residuary personal estate of *John Williams* the testator, and her share was ordered to be carried over to an account entitled, "The Account of *Amelia Ann Gynn*, an Infant." The share of *Amelia Ann Gynn* was accordingly laid out in the purchase of 472*l.* 2*s.* 8*d.* Bank £3 per Cents. and carried over to such account.

The Petitioners *William Baker* and *Amelia Ann Baker* intermarried in March, 1858, but no settlement was made prior to the marriage.

The Petitioner *Amelia Ann Baker* attained the age of twenty-one years in May, 1860.

The Petitioner, *Amelia Ann Baker*, had consented that the fund in question should be paid to the Petitioner *William Baker*.

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Mr. *E. Webster*, in support of the petition, submitted that *Amelia Ann Baker*, having attained the age of twenty-one, and joining in the petition, the Court would order the payment of the fund out of Court to the husband, without imposing any terms as to settlement on him. The bill did not pray that she might be made a ward of Court, and she never was such. He cited, *Leeds v. Barnardiston* (a); *Day v. Day* (b); *Gullin v. Gullin* (c); *Martin v. Foster* (d).

The VICE-CHANCELLOR.

There can be no doubt but that if an infant be a Plaintiff in a suit, although the bill may not in express terms pray that she may be made a ward of Court, the mere fact of her being such Plaintiff has the effect of making her a ward of Court, so that any person marrying her before she comes of age, without the leave of the Court, is guilty of a contempt of Court.

If the marriage be a contempt, then comes the question, what the Court will do when the husband and wife petition the Court to pay out a fund in Court to the husband. It is true, in the case of *Leeds v. Barnardiston*, the Vice-Chancellor of *England* made an order upon the application of a husband and wife, that upon her consent being taken the fund might be transferred to the trustees of a settlement which had been made without the sanction of the Court. If that case had

(a) 4 Sim. 538.

(b) 11. Beav. 35.

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(c) 7 Sim. 236.

(d) 7 De G., M. & G. 98.

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not been overruled, I should have considered it the rule of the Court; but in the case of *Martin v. Foster*, in which a ward of Court had been married without the consent of the Court, and a settlement had been made on the marriage, and the husband and wife petitioned that the fund might be paid to the trustees of that settlement, I made the order on the authority of *Leeds v. Barnardiston*, but the Lords Justices decided that they ought not to hand over the fund. There can be no question now but that this Court will not part with a fund upon the application of the husband, even with the consent of the wife, without a proper settlement; and, therefore, I must refuse this application: but the husband may take a reference to approve of a proper settlement.

Dec. 14.

Will.

Construction.

Contingent Gift.

In re WRANGHAM'S TRUST.

A testator gave the interest of a sum of stock to his daughter, and after her death gave the stock to the child or children of his daughter on their attaining the age of

THIS petition was presented by the trustee under the will of *William Wrangham*, praying that the rights of the parties interested in a sum of money paid into Court by him under the Trustee Relief Act, might be declared by the Court, and that the same might be transferred and paid to the persons entitled thereto.

The testator *William Wrangham*, by his will dated the 17th of October, 1839, after giving several pecuniary twenty-one years; and directed, that, in the event of his daughter dying without leaving issue, the stock should revert to his son. The will also contained a provision for the testator's son. The testator's daughter died, leaving one child, who subsequently died under the age of twenty-one, having received a maintenance out of the said stock.

Held, that the gift to the children of the testator's daughter was contingent on their attaining twenty-one, and that on the death of the child of the testator's daughter under twenty-one the stock reverted to the testator's son.

legacies, gave and bequeathed to his daughter *Mary Anne*, the wife of Dr. *Harris*, the interest or dividends of all monies which might be standing in his name in the £9 per Cents. Reduced, the same not to be under any control of her husband, and her receipt alone to be a good and sufficient discharge, "and after her decease, the principal of the said stock to her child or children in equal portions, on their attaining the age of twenty-one years; in case of Mrs. *Harris's* decease before her husband, the interest of the said principal stock to be enjoyed by the said Rev. Dr. *Harris*, during his natural life; but should Mrs. *Harris* die without leaving any issue, then in such case, and after the decease of Dr. *Harris*, the principal of the stock to revert to my son *William Wrangham*, his heirs and assigns;" and the said testator, after giving and bequeathing to his son *William Wrangham* certain freehold estates, gave and bequeathed to his son *William Wrangham* the interest or dividends of 15,000*l.* £9 per Cent. Consols, and, after his decease, the principal of the said stock to his child or children in equal portions, on their attaining the age of twenty-one years, and directed the interest of the said principal sum to be applied for their maintenance; but should there be no child or children, then he gave and bequeathed the same to his son *William Wrangham*, his heirs and assigns. And the said testator, after appointing the Petitioner a trustee and executor of his will, gave and bequeathed all the rest, residue and remainder of his property, whatsoever and wheresoever it might be, in writings, deeds, securities, and otherwise, to his son *William Wrangham*, his heirs and assigns; but in case of the decease of both his children and their children during his lifetime, he gave and bequeathed all his property to Mr. *William Houghton* and his surviving children equally.

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Mrs. *Harris* died in 1842, in the lifetime of the testator, having had one child only, *M. A. W. Harris*.

The testator died in 1845. Dr. *Harris* died in 1856, having received the interest of the stock in question down to the time of his death.

By an order made on a petition presented in March, 1857, it was ordered that a sum of 250*l.* a year should be paid for the maintenance of *M. A. W. Harris* to *Judith Wrangham*, who was by the same order appointed her guardian.

M. A. W. Harris, the daughter of the testator's daughter, died in 1860, at the age of seventeen years.

Questions having arisen as to who were entitled upon the death of *M. A. W. Harris* to the stock, the trustee paid the same into Court, and now presented the present petition to have the rights of the parties ascertained.

Mr. *Dauney* appeared for the trustee, and stated the facts to the Court.

Mr. *Glasse* and Mr. *Locock*, for *Judith Wrangham*, the administratrix of *M. A. W. Harris*, submitted that *M. A. W. Harris* had an absolute vested interest in the stock, the gift to the children of the daughter being absolute, with a direction as to the time of payment, which was to be on their attaining twenty-one. The word "on" was not a word of contingency. They cited *Bree v. Perfect* (a); *Williams v. Clark* (b); *Lang v. Pugh* (c); *Swallow v. Binns* (d).

(a) 1 Coll. 128.

(b) 4 De G. & Sm. 472.

(c) 1 Y. & C. 718.

(d) 1 K. & J. 417.

Mr. *Baily* and Mr. *Swan* for *William Wrangham*, the testator's son, contended that the gift to the children of Mrs. *Harris* was contingent on the event of a child's attaining the age of twenty-one, and that event not having happened, he was entitled under the gift over. In *Williams v. Clark (a)*, there was a gift independent of the direction as to the time of payment. They referred to *Salmon v. Tidmarsh (b)*.

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Mr. *Glasse*, in reply.

The VICE-CHANCELLOR (after reading the terms of the gift) said :—

Now that is a gift to the children of the daughter on their attaining the ages of twenty-one, which, according to the general rule, is a contingent and not a vested gift. But if you find a gift to a person or class capable of being dissevered from a direction as to the time for payment, which is to be made on attaining twenty-one, the reference to the attainment of twenty-one is considered to apply only to the payment and not to the gift, and does not prevent the gift vesting.

I quite concur in the argument that the Court will lean to such a construction as will carry into effect the testator's apparent intention; but if I were, in the present case, to put such a construction on the will as to hold that the gift to the child of the daughter was vested, I should be deciding contrary to the plain rules as to contingent and vested interests. I cannot interpret the gift as a gift to the children, whether they at-

(a) 4 De G. & Sm. 472. (b) 5 Jur. N. S. 1380.

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tained the age of twenty-one or not, and hold that the event of their attaining twenty-one does not affect it.

It is, however, suggested that the subsequent clause, giving the fund over to the son in the event of no issue surviving Mrs. *Harris*, shows that the children were intended to take vested interests, only liable to be divested in the event of all Mrs. *Harris's* issue predeceasing her. But the object of that clause was to provide for the event of one or more children attaining twenty-one in the life of their mother, and all of them and all her issue predeceasing her.

It is further said, that the event might happen of there being a child of Mrs. *Harris*, for whom the testator would probably intend to provide, who would be left unprovided for, namely, that of a child of Mrs. *Harris* marrying in her lifetime, and dying under twenty-one years of age during Mrs. *Harris's* lifetime, leaving issue who survived Mrs. *Harris*. The observation is a true one: but the question is, whether such a possibility is to countervail the ordinary rules of construction, and to render that a vested gift which would, according to the ordinary interpretation of language, be contingent only? I think not.

The case of *Bree v. Perfect* does not govern this case; the preceding limitations in the will in that case differ from this; and the Vice-Chancellor seemed to have been influenced in his decision by the decision of the Court of Exchequer, to which he refers.

The case of *Williams v. Clark* was an entirely different case from the present, the gift to the children there being independent of the direction to pay.

On the whole, it appears to me that I must hold that the gift was a contingent, and not a vested gift; and, therefore, the son of the testator is entitled to the stock.

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THE NEW BRUNSWICK AND CANADA
 RAILWAY AND LAND COMPANY v.
 MUGGERIDGE.

Dec. 5, 6, 7, 13,
 14, 15, 17.

Companies.
Misrepresentation. *Specific*
Performance.

THIS case, which is reported upon a plea to the bill (a), now came on upon the hearing. A portion of the material facts is stated in the report of the arguments on the plea; the material new facts on which the cause was decided appear in the arguments and judgment in this report.

Mr. *Baily*, Sir *H. Cairns*, and Mr. *Locock Webb*, for the Plaintiffs, confined their arguments to the equitable questions whether the Court could enforce performance of a contract to take shares, a Court of Law having decided that the contracting party was not a shareholder within the meaning of the act of parliament, and they did not argue the case of misrepresentation made by the Defendant, and on which the judgment ultimately turned. They recapitulated the facts of the case as stated in the report of the plea, and continued thus.

I. When a company issues a prospectus, a person contracting to take shares on the statements therein contained has a right not only not to be misled by any statements actually false, but to be informed of all the facts the knowledge of which might reasonably have deterred him from so contracting. And if the prospectus in that sense contains misrepresentation, or the absence of

(a) 4 Drew. 686.

true representation, the contract will not be enforced.

II. What concealment or ambiguity amounts to misrepresentation.

III. *Semble*, that when a person contracts to take shares, but has not done specific acts necessary under an Act of Parliament to make him a shareholder at law, equity will enforce the contract, and compel him to do those acts.

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The Defendant never repudiated his contract till the price of shares fell; the result of the special case at law was, that he was not liable to calls because the shares were not accepted; there could be no other decision at law upon an action brought against him as a shareholder. But that is a decision turning purely on his legal character, and the Court of Law did not decide that there was no contract. True, he has not *accepted* shares, but he has contracted to take shares, and this bill is to enforce performance of that contract: we ask that he may be compelled to do those remaining acts which are necessary to make him a complete shareholder. That is the common principle of equity. Every bill for specific performance proceeds on the footing that a party has contracted to do something completely and has not done it, and we ask that he may be compelled to accept shares in the regular and legal form.

The *Attorney-General* (Sir *R. Bethell*), Mr. *Glasse*, Mr. *F. Waller*, and Mr. *Vernon Harcourt* (of the Common Law Bar), for the Defendant.

Our real defence has been entirely concealed in the opening of this case. Our case on the facts, even if we were wrong upon the law, is that there has been misrepresentation.

But, first, we say the judgment on the plea did not decide the equitable question. The plea was overruled, as bad in form, that is all that was decided. It did not decide the question whether, if at law a person has not made himself a shareholder this Court can make him so. The act of parliament describes what persons are shareholders, and none other are such, and it makes no distinction between a shareholder at law,

and a shareholder in equity. If you make the decree asked for, you will in substance be overruling the act of parliament, you will be making a shareholder a person whom the act, and the decision at law, have said is not a shareholder.

The learned counsel then argued against the bill on other points on which no judgment was given, and then proceeded to state the particular instances of misrepresentation in the prospectus, which will be found fully detailed and commented upon in the judgment, and argued upon them as follows:—

We assume, first, that we have shown direct misrepresentation of facts in the prospectus, statements absolutely contrary to the truth. If that is so, it is clear that, upon the well-known principles of the Court, the Plaintiffs cannot ask its extraordinary relief. But, at any rate, we have made out a case of concealment whether wilful or not is immaterial, of facts necessary to be known, in order that the party applying for shares may know his true position. Now, if in a suit for specific performance there comes out any defect of title of the vendor, disabling him from fulfilling his contract, that is fatal. It is immaterial that it is not stated in our answer, the defect here comes out of the Plaintiff's own books. In fine, wherever there is mere suppression, the Court refuses its assistance. Here in several instances there is suppression of material information; the prospectus holds out to the shareholder, that he will have a right to land, as annexed to his right of shareholder. He is not told that that right is contingent, as it turns out to be. The right is now forfeited by acts over which the shareholder had no control, and it is impossible for the Plaintiffs to fulfil their contract.

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They cited *Warren v. Richardson* (a); *Clermont v. Tasburgh* (b); *Cadman v. Horner* (c); *Conybeare v. New Brunswick and Canada Company* (d).

Mr. *Baily* in reply.

The VICE-CHANCELLOR.

Judgment.

When this case was before me upon the plea, the only points on which I expressed any opinion were these:—As to the form and structure of the plea, I was of opinion that it was invalid, and I might have contented myself by simply overruling it upon that ground; but, inasmuch as the whole argument had proceeded on the merits, I thought it would be more satisfactory to the parties if I expressed my opinion upon those points which had then been argued. Those points were these. One contention was, that in fact there was no contract at all: not merely that there was no contract which the Court would enforce, but that there was no contract at all. I was of opinion that the Defendant having signed a memorandum, in which, for a sufficient consideration he had expressly said I agree to do so and so, that was a contract. Whether the Court would enforce it is quite a different question. The next point that was contended for was, that this bill sought to enforce a contract, for what is in effect a partnership, and that the Court would not do that, because, as a general rule, the Court will not enforce specifically contracts relating to mere personal interests, and more particularly relating to this sort of personal interest, namely, a contract for the formation of a partnership, because the party against whom it was enforced might the next day dissolve and put an end

(a) 1 You. Ex. Eq. 1.
(b) 1 Jac. & W. 112.

(c) 18 Ves. 10.
(d) 29 L. J. Ch. p. 435.

to the partnership, and so make the decree nugatory; upon that point I was of opinion that this was not such a partnership as could be dissolved by the mere will of an individual shareholder. He may retire, but he cannot retire simpliciter; he can only retire by getting somebody else to stand in his place. These were the only points upon which I expressed any opinion whatever when the plea was argued; and I may say that, with regard to those points, I still adhere to the opinion I then expressed.

Many new grounds of objection to the relief asked by the Plaintiffs have now been advanced on the part of the Defendant, and upon one at least of those grounds I am of opinion that a Court of Equity ought not to give to the Plaintiffs its assistance, by compelling specific performance of the contract. That ground is misrepresentation in the prospectus; and the portion of the representations contained in that prospectus, to which I more particularly refer, consists of those representations which relate to the land which was to belong to the shareholders. And when I use the term misrepresentation, it would be more accurate to describe it as a want of that full and true and complete representation, which, in my opinion, ought to have been adopted by persons issuing such a prospectus as this, and inviting persons to apply for shares on the faith of its representations.

The prospectus sets out by stating the title of the company; and it will be observed that the company is described not only as a railway company but as a land company, showing that the dealing in or the possession of land was as much part of the functions and objects

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of this company as the formation of a railway. After stating what the capital was to be, and the number of shares into which it was to be divided, it proceeds to state this, "Of which (that is of the 40,000 shares into which the aggregate capital was to be divided), 40,000 shares only 17,500 shares, or 350,000*l.* stock, will be disposed of at present, being the amount required to complete the first section to *Woodstock*; which, after appropriating 4,000 to the *English* proprietors of the *St. Andrews* and *Quebec Railroad Company*, and 2,500 to the local government, will leave only 11,000 shares, or 220,000*l.* to be subscribed by the public." Then comes this passage, which I consider material, "The 4,000 shares to be given to the *St. Andrews* and *Quebec* proprietors will be entitled to 60,000 acres of land, or 15 acres per share, and be designated class C; they will take equal dividend with the new shares, class B, but no interest during construction." That is a representation that the holders of those 4,000 shares will be entitled to 60,000 acres of land, or 15 acres per share. Then it goes on thus: "The 11,000 shares to be issued to the public will consist of two classes, A and B; class A to consist of 4,000 shares, to be entitled to a government guarantee of 6*l.* per cent. for twenty-five years, to commence immediately on the completion of the line to *Woodstock*, with a bonus of 16,000 acres of land, or 4 acres per share." So there is a representation that, as to class A, the persons taking those shares would have a bonus of 16,000 acres of land, or 4 acres per share. Then follows, with regard to class B, that is to consist of 7,000 shares, entitled to a bonus of 105,000 acres, or 15 acres per share, and 5*l.* per cent. on the deposit and calls during the construction, but no government guarantee. Now

I may observe, with regard to the passage which states the advantages to be enjoyed by the class A shareholders, that the government guarantee of 6l. per cent. for twenty-five years is expressly stated to commence only on the completion of the line to *Woodstock*; but the bonus of 16,000 acres of land is not stated to be a deferred benefit, or to be dependent on the completion of the line to *Woodstock*; and this, as it seems to me, would lead to the conclusion that, although the guarantee was future and contingent, the right to the lands was not to be future or contingent. Then follows this, "For every share, whether A or B, two certificates will be issued, the one to be called the capital stock share, which will entitle the holder thereof to the dividends of the railway; the other to be called the land stock share, which will entitle the holder thereof to the land belonging to that share, and all profits resulting therefrom." Now, in that language, there is nothing which points to contingency; but it in effect represents that it would be a benefit, which persons taking shares would immediately become entitled to. Then follow other clauses, not I think material to the point to which I am now addressing myself; but, in passing, I may observe (with reference to a remark I shall have to make) that there is a statement that twenty-four and a half miles have already been completed, and six miles more so nearly completed, that the thirty miles may be open for traffic in a short time. Then comes what appears to me a very material passage in reference to this question of inaccurate, and in that sense untrue, representations in the prospectus:—"The original company succeeded in obtaining the following important advantages from the colonial government, which will now be transferred to this company, viz." Then follows an enume-

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ration of those important advantages. "Succeeded in obtaining,"—the import of that language is plain. It speaks of something that had actually taken place. It represents that they had actually obtained those important advantages. And what are these important advantages? First, "the free grant of the unallotted land ten miles in width, or five miles on each side of the railway, for the whole extent of the crown territory through which the line will pass to *Woodstock*, being, it is estimated, upwards of 200,000 acres." I think it is hardly possible to use language which, according to its natural import, is more plain than this, to indicate something actually settled and certain; and not to indicate anything future or uncertain or contingent, something which might or might not take place. Then they proceed to the second advantage, which is connected with the former, though not very material to point out, it is, "all the timber and materials, the property of the crown, requisite for the construction of the railway." Then we come to the third, which seems to me to be material, and this is printed in italics, for the purpose of attracting special attention on the part of those under whose eyes it should fall. It is this—"A guarantee of a minimum dividend of 6*l.* per cent. on 80,000*l.* for twenty-five years, to commence on the completion of the line to *Woodstock*." Here again the same observation which I made before applies; that in enumerating these advantages, that of having obtained a free grant of so much land is stated, without a word about its being contingent or dependent on the completion of the line to *Woodstock*; whereas the guarantee is stated not to commence until the completion of the line to *Woodstock*, that is, it is stated to be dependent on that completion. Then, lower down in page 2 of the

prospectus, we have painted in glowing and brilliant colours, the great advantages which the shareholders would be entitled to; and this is not immaterial, because the advantages held out are advantages much less in connection with the possession of shares in the railway, than with the possession of the land stock shares. Among others this passage occurs, "Before referring to what may be termed the profits arising from the traffic on the line of railway, it is proper to state that a large income will be received by the proprietors of the land from the sale of fire-wood or cord-wood as it is called in *New Brunswick*." And then it proceeds to point out that the proprietors would derive other considerable profits from the possession and enjoyment of this land. Then, we come to this, which is in page 3 of the printed prospectus, "A certain amount of surplus land has been reserved for sale, the proceeds of which will be appropriated to the payment of interest to classes A and B during construction." Let me assume, as it is contended on the part of the Plaintiffs, that the word "reserved," means reserved from appropriation to the shareholders. Here, then, it is pointed out, that, inasmuch as during construction, when of course there could be no profits from the working of the line of railway, there was to be a payment of interest to the two classes of shareholders, A and B, viz., 6*l.* per cent. to the one, and 5*l.* per cent. to the other, the money necessary to pay that interest was to be raised by the sale of a certain portion of the land, which was reserved for that purpose. But inasmuch as the interest was to be paid during the construction of the railway, that is, to commence immediately, there must be an immediate sale of some of the reserved land, which would be impossible if the title to the land was altogether future and contingent. Therefore any one read-

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ing this passage would take it for granted that the company had a present, absolute, unconditional title to the land, otherwise how could they pay the interest during the construction by means of the proceeds of the sale of those lands?

These are the passages in the prospectus, which appear to me more materially to bear upon this question. It is true that in no one of those passages, nor in any part of the prospectus, is it stated in express terms that the right of the land will accrue to the persons who should take shares instant, or that they would have a certain and indefeasible title to the land. But on the other hand, there is a total absence of all mention of, or allusion to, futurity or contingency, or condition affecting the right to the land. There is not the slightest hint, that events might so turn out, that no shareholder would be entitled to a single rood of the land, which is here held out as the attraction to take shares. Now it does appear to me that a person reading this prospectus, and knowing nothing more than what is to be derived from the perusal of it, might well conclude from the language used that, if he accepted shares in the proposed company, he would thereby acquire a right to a certain portion of 200,000 acres of land, which had then been granted to the company; and that he would be entitled to such land unfettered by any condition, or contingency, or uncertainty, except of course the ordinary condition of paying up his calls. That, I think, is the natural and plain import of the language used in this prospectus. It was, however, contended by the learned counsel in his reply, that there is a word used in this prospectus, which ought to have shown to any body reading it, that in point of fact the land had not been granted to the company; and that is the word

“ungranted.” That word occurs in an extract quoted in the prospectus from a report made by a Mr. *Baillie*, who had formerly been the surveyor-general of the colony, which is dated at *Blackheath*, on the 18th of February, 1856, commencing thus:—“The quantity of ungranted crown lands within five miles of the proposed line of railway from *St. Andrews* to *Woodstock* is about 200,000 acres;” and then the report goes on to expatiate on the improvable quality of this land, and the value which it might attain by cultivation, and by the construction of the railway. It is contended that the land being thus spoken of as “ungranted,” that shows at once that the 200,000 acres had not been granted to the company. Now I may observe, that whatever may have been the case at the time to which Mr. *Baillie’s* report referred, it is conceded on all hands that, at the date of the prospectus, some portion of these 200,000 acres had been actually granted to the company; so that it was clearly not intended by the prospectus to represent that the 500,000 acres were then ungranted. But further, the passage in which the word “ungranted” occurs is not the language of the framers of the prospectus, but is the language of Mr. *Baillie*, the former surveyor-general, who, in his report, had been speaking of ungranted lands, that is, lands which at the time when he was surveyor-general had been ungranted in the ordinary way to settlers and others. It appears to me, therefore, that this word “ungranted,” thus contained in the passage quoted from Mr. *Baillie’s* report, would not, in the face of the other language that I have pointed out in the prospectus, lead any one to any different conclusion from this, that a free grant of 200,000 acres had, at the time this prospectus was issued, been actually obtained by the old company,

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whose property was all to be transferred to the new company.

Now what were the actual circumstances with respect to the land at the time when the prospectus was issued, and when these representations were made? Looking at the acts of the colonial legislature, which relate to the land, the first act I think which mentions anything about any land being granted, or proposed to be granted to the company, is an act of the 10th *Vict.* cap. 84, in the 4th section of which there is a clause by which the lieutenant-governor is authorized, with the advice and consent of the executive council, to grant, on the completion of the line to *Woodstock*, 20,000 acres to the company; but inasmuch as that act is merged in or superseded by a subsequent act, it is not necessary to dwell further upon it. The material act is the act of the 12th *Vict.* c. 74. The first section of that act is this:—"Be it enacted, by the lieutenant-governor, legislative council and assembly, that on the completion of the railway from *St. Andrews* to *Woodstock*, with a branch to *St. Stephen*, in the county of *Charlotte*, together with all the station houses, engines, carriages, cars, and other furniture necessary to put the same in good working condition, in that event, it shall and may be lawful for the said company, at their own proper costs and charges, and under the supervision of the surveyor-general of the province, to survey and lay out all the crown lands contiguous to, and within five miles on each side of, the said roads, which said quantity of land the said lieutenant-governor or administrator of the government for the time being, by and with the advice of the executive council, shall be empowered to grant in fee-simple to the said company, free from any charge, save and except the expense of survey as aforesaid." Stop-

ping there for a moment, it is clear that until the completion of the line to *Woodstock*, and its being entirely fitted with all that is necessary to put it in good working condition, the company is not to be entitled even to make a survey of the lands. But further, supposing the company to have made that survey, then the lieutenant-governor, by and with the consent and advice of the executive council, may grant the land to the company; but could the executive council be compelled to give that advice to the lieutenant-governor? Or could he be compelled to act upon it if given? But however that may be, let me proceed to the proviso that follows in the same section of the act:—"Provided always nevertheless, that nothing in this act contained shall extend, or be construed to extend, to prevent the executive government of this province, if they shall see fit, from disposing of any of the lands contiguous to the said contemplated line of railroad for actual and immediate settlement, or of disposing of the timber and logs now growing and being thereon." So that although this clause contains power to the company when they had completed the line to *Woodstock* to enter and to survey what should then be the crown lands, to the extent of five miles on each side of the line of railway, and then the governor might make them the grant, it is expressly provided that, if, for the purpose of immediate settlement, the executive government should think fit to make grants of any portion of this land to settlers, and to sell and dispose of the timber and logs then growing on any part of that land, nothing in this act should prevent them doing it. And, therefore, instead of there being at the time of the completion of the line to *Woodstock* (if it ever was completed) 200,000 acres of crown land, which the company then might have a right to enter and survey, and ask the lieutenant-

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governor and the executive council to grant to them, there might be only half that quantity, or any less quantity, because any portion of those lands might have been in the meantime under this proviso granted away to settlers, and the timber and logs disposed of by the government. Then there is another section of this same act which appears to me to be material. It is the 3rd section, by which it is enacted, that this act shall be and continue in force for ten years from the passing thereof, and no longer. Now this act was passed on the 14th of April, 1849, so that in 1859, unless the railway were completed to *Woodstock* by that time, there would be an end of all power on the part of the executive council to grant any land at all. And it will be observed, that the period which is there pointed out as being the period during which alone this act was to be in operation, is not coincident with the period which was fixed for the completion of the railway. Then there are the acts of 1856 of the local legislature, which bear to a certain extent on the question. The first is the act of 19 *Vict.* c. 19, which was passed on the 12th of April, 1856, that is shortly before the time when Mr. *Muggeridge* made the application for his shares, and which I think must have been known in this country in July. The 2nd section of that act is in these terms:—"The company, to entitle themselves to the privileges, benefits and advantages to them granted by the several acts of assembly relating to the company, shall, and they are hereby required, to make and complete the railroad from *St. Andrews*, in the county of *Charlotte*, to *Woodstock*, in the county of *Carleton*, and also a branch thereof to the river *St. Croix* (describing it), within four years of the passing of this act; and if the same shall not be so made and completed within such four years, so as to be used for the conveyance and

carriage of passengers, goods, chattels, wares and merchandize thereon, then the several acts of assembly relating to the company, including this act, and every matter and thing therein contained, shall cease and be utterly null and void." The other is an act of the 19 *Vict.* c. 69, which recites several of the prior acts, and then recites thus:—"And whereas several grants of crown lands have under the recited acts or some of them been made to the company:" and then it proceeds in the 2nd section to enact thus:—"If the part of the contemplated *St. Andrews* and *Quebec* railroad, which may be between *St. Andrews* and *Woodstock*, and also a branch thereof to the river *St. Croix*, at or near the *Lodge* (so called), in the parish of *St. Stephen*, in the county of *Charlotte*, be not completed and in full operation within the space of four years from the time when this act comes into operation, all and every the grants of land, and the rights and privileges conferred by the several facility acts relating to the company, shall be utterly null and void, and the land and privileges shall revert to her Majesty, as if no grant had been made, or rights and privileges conferred." There is one other passage in the same act which has the same bearing, and is to this effect: it is the 9th section,—“Provided always, that this act and the extension of time therein mentioned, are on the express condition that the company or the class A shareholders (that is the class A shareholders of the old company), or the directors thereof, shall, within one year from the time this act comes into operation, expend in the construction and further extension of the parts of the said road above mentioned, a sum not less than 8,000*l.* sterling, and also in each of the three following years a sum not less than 15,000*l.* sterling, over and above any money or debenture which may be received by them under any

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facility act or law of this province; the whole from *St. Andrews* to *Quebec* to *Woodstock*, together with a branch to *St. Stephens* as aforesaid, to be completed within the said four years; satisfactory proof of such annual expenditure shall from year to year be given to the lieutenant-governor in council; failing any of these payments or expenditures, the facilities granted shall cease." So that the privileges of the company are not only dependent on the completion of the line to *Woodstock* in four years, but they are dependent also upon a certain specific amount being expended in each of those years, thus introducing another contingency affecting the interests of the persons who should take shares, in the expectation of having so much land in connection with those shares.

Now in the Defendant's answer he states this:—"The impression produced upon my mind by those words (referring to the words of the prospectus) was, that the original company referred to in the prospectus was in the actual possession of the 200,000 acres, of which the proposed company could somehow or other be put in immediate possession, and this impression was confirmed by the latter portions of the prospectus which introduced a report of the value of the lands in the following terms." Then follows another passage from the prospectus which I have already referred to. Then he goes on in the next paragraph of his answer to state this: "I applied for shares in the new company in reliance on these representations, and in the full belief that an indefeasible grant of the said strip of land from *St. Andrews* to *Woodstock*, amounting to above 200,000 acres, had been actually obtained by the said original company, and that I should be indefeasibly entitled to fifteen acres of land for every B share allotted to me,

and to four acres for every A share so allotted ; and in receiving an allotment of 200 B shares and 50 A shares I considered that in virtue of these shares I should, so soon as the same should have been paid up, become entitled to the 3,200 acres of land in *New Brunswick* in actual and indefeasible possession. I attached great importance to this land, which I considered would in the course of a few years be of very great value, though perhaps not then worth the 12,800*l.* as estimated in the said prospectus." Nothing can be more explicit than that as to the impression produced on his mind by reading the prospectus, upon the faith of which he applied for shares. He was cross-examined on answer ; and among other questions was asked this : "Be good enough to point out the paragraph in the articles of the association and prospectus of the company which you refer to in your affidavit as being inconsistent one with the other." He had said in a former part of the examination that he thought there were inconsistencies in the passages in the prospectus, and he was asked to point them out. He says, "I decline to answer the question, the documents speak for themselves." I think he was justified in that. He is not obliged to enter into any argument to prove on what particular passages of the prospectus he founds the impressions which he states he drew. Then he goes on thus : "I do not remember if I had read the prospectus of the company when I had the impression that the original company was in possession of 200,000 acres of land, I never remember hearing that, at the time I applied for shares in the Plaintiffs' company, the guarantee and the land allotted to the A and B shares were to be contingent on the completion of the line to *Woodstock* ; but I had read the prospectus at the time I had applied for shares. I do not remember to have believed that if the line was

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not completed the Plaintiffs would be entitled to the grants of land; I felt that I should be entitled to land, but I did not think at all about whether I should be entitled if the line to *Woodstock* was not completed; I do not know the grants of land which the Plaintiffs' company have had since their incorporation; I am not aware that the land grants have been admitted in this cause;" and then the cross-examination proceeds with regard to the statement contained in the 14th paragraph of his affidavit, as to his belief that an indefeasible grant of 200,000 acres of land was actually granted to the Plaintiffs' company, "that (he says) was my impression in reading the prospectus." He was then asked to point out the paragraphs in the prospectus which led to that impression, and he says "I decline to point out the paragraphs in the prospectus, it speaks for itself, I have made no application for the four acres and fifteen acres of land since I made my application for shares, and I have made no application at all since my application for shares." Now here we have (and I think it is not removed by the cross-examination) a distinct statement on the part of the Defendant that he, from the perusal of that prospectus, derived a certain impression which I have already said appears to me to be clearly the impression which the language was naturally calculated to produce, and he states further, that under that impression, and in the faith of the prospectus, so interpreted by him, he made his application for the shares. Now it has been argued that that indicated a great want of care on the part of Mr. *Muggeridge*; that one of ordinary capacity and judgment would have assumed, as a matter of course, that the grant of the land could not be otherwise than dependent on the completion of the line to *Woodstock*, though not so specified in the prospectus, and that therefore, even

though Mr. *Muggeridge* says that the impression produced upon his mind by reading the prospectus was, that there was no such contingency or condition, that shows a want of care and vigilance on the Defendant's part, and he ought to have been more acute, and that if he had exercised a sound judgment he must have concluded that the right to the land was contingent, because it was unreasonable it should be otherwise. Now, in the first place, assuming that a person might reasonably take for granted that the government would not do so improvident an act as to make a gratuitous grant of 200,000 acres of land to a company without a condition that they should have done or should do something by a certain limited time, what was there in the prospectus to lead him to any conclusion as to what that something was? The prospectus states that they had completed twenty-four and a half miles, and that six miles more were nearly completed, making thirty; why might not the condition be, that upon the completion of those thirty miles, or any other number of miles of the line the grant should be made. If we are to assume that a person ought to have concluded, that some condition was annexed, why the particular condition of completing the whole line to *Woodstock*? Further it appears to me that it is quite necessary to uphold this as a principle: that those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree

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affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares; and that they have no right to turn round upon those who refuse to fulfil their contracts to take shares and say to them, "you ought to have been more prudent, more circumspect, more cautious, more vigilant; you ought, by applying your reasoning powers, to have concluded that our representations could not be true in the sense which the language we used in the prospectus naturally and fairly imports; and when you read our representation that the old company had obtained a free grant of 200,000 acres of crown land, you ought to have concluded that what we meant by those words was, that at some future period, in certain contingencies, on the performance of certain conditions, the company may perhaps obtain a grant of 200,000 acres or some indefinite portion of that land." They have no right to argue in that way. It is of no avail to say that Mr. *Muggeridge* was wanting in caution and vigilance and prudence. I agree, indeed, that to a certain extent he was so. A wise and prudent man would, I think, have paused before he embarked his money: and I have no reason to doubt that, if the Defendant had gone to the office of the company and made the inquiry, he would have been informed of all the details he chose to inquire about; because I confess it does not appear to me necessary to suppose that there was in this case actual intentional fraudulent misrepresentation. At all events I do not think there is sufficient foundation for those very strong and repeatedly reiterated accusations of fraud and conspiracy, amounting to what would subject the parties to a criminal indictment, which have been very copiously lavished on the persons who issued this prospectus; but however that

may be, even assuming that these misrepresentations or want of accurate representations, were not intentionally fraudulent, those who make them cannot take advantage of want of caution and prudence on the part of those who are misled by them. Supposing that a prospectus were issued containing material misrepresentations, even though believed by the parties who issued it to be true, and a person accepts shares upon the faith of those representations, the parties who have made the misrepresentation cannot compel the party who has contracted to take the shares to perform his contract.

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[His Honor then went into another minor case of misrepresentation, to which he applied the same reasoning and doctrine, and concluded by stating that on the ground of the prospectus not setting forth clearly those facts which are essential to enable a contracting party to know completely what it was he was contracting to purchase; he was of opinion that the Plaintiffs were not entitled to specific performance; and he dismissed the bill, but without costs, on account of the laches and negligence of the Defendant.]

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*Indemnity.**Executors.**Leaseholds.*

22 & 23 Vict.

c. 35, s. 27.

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Where leaseholds were devised to three trustees and executors, and one of them having died, the two surviving trustees and executors (one of whom had never acted as executor) under an order of the Court assigned the leasehold in trust for themselves and a newly appointed trustee: *Held*, that by such assignment the leaseholds vested in them *quà* trustees and not *quà* executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will.

Where an executor fairly represents everything to the Court, a decree directing him to deal with the property must operate as an indemnity to him.

The act of the 22 & 23 Vict. c. 35, is retrospective in its operation.

THIS petition was presented by *John Graham Smith*, praying that the trustees under the will of the testator *William Smith* might assign to them (*inter alia*) certain leasehold property of which the testator died possessed, and that they might be ordered to pay over to him the residue of the testator's estate.

The testator *William Smith*, by his will dated the 24th day of February, 1840, after making certain provisions for his wife and daughters, gave and devised all the rest, residue and remainder of his trust estate, monies, &c., to three trustees and executors, appointed in and by his will, upon trust for the Petitioner *John Graham Smith*, and such other sons as should live to attain the age of twenty-five years; and if but one, then the whole to such one child.

The testator died in February, 1840, leaving the Petitioner *John Graham Smith*, his only son, who attained the age of twenty-five in January, 1861.

Two only of the three trustees and executors proved the will, and one of them having subsequently died in 1855, *George Augustus Smith* was by an order made in July, 1855, appointed a new trustee in his place. And by an indenture dated the 29th of August, 1855, the

leasehold estates of the said testator were assigned by the two surviving trustees and executors to a trustee upon trust to re-assign the same to themselves and the newly appointed trustee, and such reassignment was shortly afterwards executed.

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By an order made in 1857, on a petition presented by the present Petitioner, it was declared that upon the death of the testator the Petitioner became absolutely entitled (*inter alia*) to one-third of two-thirds of the testator's residuary personal estate, and the trustees were ordered to assign such proportion of the testator's leasehold property to the Petitioner.

No assignment of such portion of the testator's leasehold property was then executed; and the Petitioner, on his attaining the age of twenty-five, became entitled to have the entirety of the testator's leaseholds assigned to him by the trustees.

It appeared that the testator's leasehold property was acquired by him by an assignment from his brothers, on a partition by way of family arrangement, and the testator was not lessee thereof, nor had he any previous interest therein; and the testator and his brothers entered only into mutual covenants to indemnify each other in respect of the leaseholds acquired by each on such partition.

The trustees now insisted that they were entitled in respect of such leaseholds to an indemnity in respect of the covenants contained in the leases, although the Petitioner offered to covenant to indemnify them against such covenants.

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Mr. *Baily* and Mr. *Horsley* appeared in support of the petition, and submitted that the trustees were not entitled to any such indemnity. The testator was not an original lessee of any of the leaseholds in question, but acquired them under an assignment by way of partition. The Petitioner, however, would covenant to indemnify them. One of the trustees asked for an indemnity as being also an executor, but his right (if any) to such indemnity was waived by the assignment on the appointment of the new trustee. The leaseholds were held by the trustees *quâ* trustees, and not *quâ* executors; and the order which was made in 1857 reserved no right to such indemnity. The act of 22 & 23 Vict. c. 35, s. 27, (Lord *St. Leonards'* Act), had rendered such an indemnity unnecessary. They referred to *Garrett v. Lancefield* (a); *Dean v. Allen* (b); *Bunting v. Marriott* (c); *Dix v. Burford* (d).

Mr. *Glasse* and Mr. *Dewsnap* for the trustees.

Mr. *J. J. Jervis* and Mr. *Surrage*, for other parties.

THE VICE-CHANCELLOR.

I may take this opportunity of saying, that after communication with the other Judges, I have come to the conclusion (though I had previously been of a different opinion), that the 27th section of Lord *St. Leonards'* Act (e), is retrospective in its operation. In the present case I think the Petitioner is entitled to an assignment of the leaseholds, without setting apart any portion of the property by way of indemnity.

(a) 2 Jur. N. S. 177.
(b) 20 Beav. 1.
(c) 9 W. R. 264.

(d) 19 Beav. 409.
(e) 22 & 23 Vict. c. 35.

Supposing there had been no dealing with the leaseholds by the executors, would they have been now entitled to any indemnity? In following the previous decisions, I have held that executors have such right; but I concur with the Master of the Rolls in thinking that where an executor fairly represents everything to the Court the decree, directing him to deal with and distribute the property, must operate as a complete indemnity to him; and that therefore an executor cannot need any other indemnity. It has, however, been suggested, that there ought to be a fund set apart by way of indemnity, not for the benefit of the executor, but for the benefit of the lessor, in case of there being at any future time a breach of covenant? Now if the lessor is entitled to any such equity as this, it would seem to follow that he might come to this Court to assert such equity, and to ask the Court to set apart a sum of money out of the testator's assets, to provide for the event of a future breach of covenant, for which he might be entitled to recover damages. But it has been held that a lessor cannot be heard in this Court to maintain any such right. In truth the whole doctrine on this subject is in a very unsatisfactory state; and does not seem to be founded on sound principles.

But it is unnecessary to decide the general question in the present case; for supposing that there was originally a right in the executors, either for their own benefit, or for the benefit of the lessor, to ask for an indemnity, they have so dealt with the leaseholds, that the right no longer exists. It has been held, that if the executors assign the leaseholds to the legatee (whether specific or residuary), they lose their right to an indemnity. Here the surviving executors have assigned the leaseholds to trustees for the residuary legatee. And

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it makes no difference that some of those trustees are also executors. The leaseholds are no longer vested in them in their character of executors. It is the same thing as if they had assigned the leaseholds to the residuary legatee. The Petitioner is entitled to have the leaseholds assigned to him, without setting apart any portion of the assets by way of indemnity.

POWELL v. TROTTER.

Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper, such objection must be raised by the bill; otherwise the mortgagor will be only entitled to an ordinary decree allowing the Defendant "necessary repairs and lasting improvements."

THIS suit, which was for redemption, now came on upon motion for a decree. The question was, whether the Defendant, a mortgagee in possession, should be allowed certain sums which he had expended on the mortgaged property.

By an indenture of mortgage dated the 17th of March, 1841, the Plaintiff granted to the Defendant a piece of land in the county of *Gloucester*, for the purpose of securing to the Defendant the re-payment of the sum of 120*l.* with interest. In 1842 the interest having fallen into arrear the Defendant entered into possession of the land, and in 1843, under the power of sale contained in the mortgage deed, offered the land for sale by auction. The land not having been sold at this sale the Defendant continued in the receipt of the rents, and in 1851 expended considerable sums of money in repairing and improving the property. In 1852 the Plaintiff applied

A mortgagee in possession, who had neglected or refused to render an account upon the demand of the mortgagor, refused his costs up to the hearing.

to the Defendant for an account which was furnished to him, and in March, 1860, the Plaintiff, by letter, formally demanded an account from the Defendant, threatening that if the account were not rendered within one month proceedings would be taken, and offering to pay what was due upon the mortgage. The mortgagee not having rendered an account or taken any notice of the mortgagor's letter, the latter, in May, 1860, filed this bill for redemption, which contained the following statement :—" The Defendant alleges that she has expended divers sums of money in repairing and improving the mortgaged premises, but the Plaintiff says that if any such monies have, in fact, been so expended, it has been without his knowledge and consent."

1861.

 POWELL
 v.
 TROTTER.

The Defendant claimed to be allowed about 200*l.* expended by her in necessary repairs and new buildings. The Plaintiff, by his affidavit in reply, stated that these new buildings were unnecessary and improper.

Mr. *Glasse* and Mr. *Swan*, for the Plaintiffs, submitted that the Defendant was not entitled to be allowed for the new buildings, and asked for the costs of the suit as against the Defendant, she having neglected or refused to render an account.

Mr. *Southgate* for the Defendant submitted that the Plaintiff was only entitled to the usual decree for redemption, under which the Defendant would be allowed what she had expended in "necessary repairs and lasting improvements" (a). No case had been made by

(a) Seton on Decrees, p. 188.

1861.
POWELL
v.
TROTTER.


the bill against the claim for allowance in respect of the new buildings. The only reason why the Defendant had not rendered an account was, that it would have been useless to have done so until the question in dispute as to the allowance of the money expended in the erection of the new buildings had been decided.

The VICE-CHANCELLOR.

There is no suggestion in the bill in this suit that the new buildings are not for the improvement of the mortgaged property, the bill only alleges that they were not done with his consent or knowledge; but that is no reason why they should not be allowed. In his first affidavit made in support of the bill the Plaintiff makes the same statement as was made in the bill. In her answer the Defendant states that she has made various improvements, and the Plaintiff in his affidavit in reply introduces an allegation which raises an entirely new issue, saying that the repairs were unnecessary and improper.

I apprehend the rule to be, that where a mortgagee is in possession and the mortgagor files a bill to redeem, and the mortgagee states that he has made repairs and improvements, and the mortgagor wishes to set up that they were unnecessary and improper, he must set that up by his bill; and unless that is done the Defendant will be entitled to have the ordinary direction to allow for necessary repairs and lasting improvements. The Plaintiff, however, contends that some words should be introduced into the decree, so that the question may be gone into whether the repairs and improvements were necessary or not; but there is no foundation for it on the pleadings, and therefore the Plaintiff can only have

the usual decree to redeem, with the usual direction as to repairs and improvements.

1861.

 POWELL
 v.
 TROTTER.

The next question is, as to the costs of the suit up to the hearing. In ordinary cases the mortgagee would be entitled to have all his costs of the suit added to his debt, but the Plaintiff insists that in this case the Defendant ought to pay the costs up to the hearing, because the right to redeem has been resisted, or at least the Defendant has refused to account. No doubt if the misconduct of the Defendant has rendered this suit necessary the Court will make him pay the costs of the suit, or in some cases will merely deprive him of his costs. In this case, in the year 1852 the Defendant's solicitor sent to the then solicitor of the Plaintiff a statement of the account as it stood at that time. But in March, 1860, a regular notice was sent by the Plaintiff to the Defendant, requiring the Defendant, within one month of that date, to render an account. It is true that there was a dispute at that time whether these repairs and improvements ought to be allowed for, but still it was the duty of the mortgagee to have taken some notice of the Plaintiff's demand. I do not say that it was her duty, at her own expense, to make out an account and send it to the Plaintiff, but it was her duty to keep the accounts and have them ready, and either send them to the Plaintiff or inform him that at any reasonable time he might come and see them. But that was not done, and after waiting one or two months this bill was filed without any further communication between them. Up to that time the Defendant seemed to have been under the impression that she had the equity of redemption, and was the absolute owner; but whatever was her motive for abstaining from any communication she violated her duty. What is a mortgagor to do when a mortgagee is

1861.

POWELL
v.

TROTTER.

in possession? It is impossible for him to know, except from the mortgagee, what the debt amounts to, and unless the mortgagee is bound in some way to offer, though not perhaps to make out and send, an account, what is a mortgagor, who wishes to redeem, to do? Considering then that there was a right to redeem, and that the Defendant has not done what she was bound to do, the costs up to the hearing must not be given to the Defendant in taking the account of what is due.

Feb. 28.

10th Consoli-
dated Order,
Rule 7.Administration
Summons.
Service Abroad.

The Court has no authority under the 7th rule of the 10th Consolidated Order to order the service abroad of an administration summons.

THIS was a motion to discharge an order which was obtained in November last for service abroad of an administration summons.

LESTER v. BOND.

In 1852 *James Young* died intestate, and in default of next of kin administration to his estate was taken out by the Crown. In 1859, however, a *Mrs. Gardiner* claimed to be entitled as next of kin ex parte paternâ of the intestate, and having satisfactorily proved her pedigree the Crown withdrew from the administration; and letters of administration were granted to her by her solicitor (the Defendant) *William Key Bond*, by whom the intestate's property, to a considerable amount, was taken possession of as administrator, and paid over by him to *Mrs. Gardiner*.

The Plaintiffs, *Frederick* and *Martha Lester*, claiming to be as nearly related to the intestate, *James Young*, ex parte maternâ as *Mrs. Gardiner* was ex parte paternâ, after *William Key Bond* had administered to the intestate's estate, obtained a citation from the Probate

Court to *William Key Bond* as such administrator, calling upon him to file an inventory of assets. *Bond* accordingly filed an inventory, and subsequently a second one.

1861.

 LESTER
 v.
 BOND.

On the 16th of November, 1860, a summons for the administration of the intestate's estate was taken out at Chambers, and on the 17th an order obtained for service of this summons on *Bond* at *Cincinnati* in the United States of *America*, where both *Mrs. Gardiner* and *Bond* lived. The time for service stated in the summons was fourteen days, but the time allowed for service by the order was six weeks.

Mr. Chapman Barber now moved on behalf of *William Key Bond* to discharge the order for service for irregularity, on the grounds that the Court could not order service abroad of an administration summons, that the time for service stated in the order and in the summons were different, and that the case being one involving questions as to the title to the property, was not in its nature one for an administration summons, but for a suit; and that *Mrs. Gardiner*, to whom the property in question had been paid over, was not a party. He cited *Lorton v. Kingston*(a); 10th Consolidated Order, rule 7; *Innes v. Mitchell* (b); *De la Viesca v. Lubbock*(c).

Mr. Prendergast, for the Plaintiffs, submitted that the Court had authority under the 10th Consolidated Order to order service abroad of the administration summons, such a summons being merely substituted for a suit by bill.

(a) 2 M. & G. 139.

(b) 1 De G. & J. 423.

(c) 10 Sim. 629.

1861.

LESTER
v.
BOND.

The VICE-CHANCELLOR.

I think this order must be discharged. The question is, whether an administration summons can be served abroad under the authority given to the Court by the act or by the General Orders, and I do not think it can. The object of an administration summons is to provide a summary and speedy proceeding in order that a creditor, or legatee, or next of kin, may have the accounts taken without the expensive process of a suit where there is no question as to title or breach of trust. But in a case like the present, where a foreigner comes to this country and obtains administration as attorney for another person also residing abroad, and as such administrator receives the assets and hands them over to the person for whom he is acting, the reason for this speedy mode of procedure does not apply. The 7th Rule of the 10th Consolidated Orders authorized the service of a copy of a bill out of the jurisdiction, but not the service of an administration summons. The order, therefore, being irregular, must be discharged with costs.

1861.
March 15.

Construction.
Will.
Implied Gift.
Intestacy.

Re EDDOWES.

THIS case came on upon a petition praying that the rights of all parties in a fund, which had been paid into Court under the Relief Act, by the trustees under the will of *James Eddowes*, might be declared; and that the same might be paid to the persons entitled.

The question in the case arose upon the construction of the will and codicil of *James Eddowes*, who by his will, dated in February, 1846, after giving certain legacies, gave his real and personal estate to trustees, upon trust to permit his wife to enjoy one-fifth part thereof during her life, and as to all the rest, residue and remainder upon trust for his child, if only one, or all his children equally if more than one, who should survive him and who being a son or sons should have attained or should attain the age of twenty-one years, or being a daughter or daughters should have attained or should attain that age or be previously married, and for their respective heirs, executors, administrators and assigns, subject nevertheless as to the shares of his daughters to certain provisions for settling the same for the benefit of themselves and their children. The testator also declared that in case, in the opinion of his wife and trustees, any one or more of his children should become unworthy or unfit to have a share of his estate, it should be lawful for his wife and trustees, by any deed duly executed by

A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons, and gave the same to his trustees upon trust at their uncontrolled discretion to apply the same, or such parts thereof as they should think proper, for the personal maintenance and support or otherwise for the benefit of his said son, or otherwise to apply the same in augmentation of the shares of the testator's other children. The trustees did not exercise the power, but

paid the share in question into Court under the Trustee Relief Act.

Held, that there being no gift in favor of the person who would be benefited by the exercise of the power, as in *Brown v. Higgs* (4, 5, 8 *Ves.*), no gift could be implied, and therefore that there was an intestacy with respect to the share.

1861.

Re
EDDOWES.

them, to declare the share or shares of the child or children so deemed unworthy or unfit to be suspended for any term or period, not exceeding twenty years from the time of his decease, or absolutely annulled and forfeited, as if such child or children respectively had died in his lifetime without issue.

The testator by a codicil to his will appointed other trustees and executors, and after certain other alterations in the dispositions of his property he revoked the trusts declared by his will of and concerning the share to which *James Eddowes*, as one of his sons, was presumptively entitled by virtue of the said will, and he bequeathed that share unto his said wife and his cousin *William Bullock*, upon trust at any time, or from time to time, at the uncontrolled discretion of the said trustees thereof for the time being of the said share, to apply the whole, or such part as the trustee or trustees thereof for the time being should think fit, of the capital or income of the said share or both, for the personal maintenance and support or otherwise for the benefit of the said *James Eddowes*, or, at the option of the trustees or trustee for the time being of the said share, to apply the whole or such part thereof in augmentation of the shares of the testator's other children, upon and subject to the same trusts, limitations, powers, intents and purposes as were declared by his said will concerning such shares respectively.

The testator *James Eddowes* died on the 29th of November, 1853, leaving his widow and seven children, one of whom was his son *James Eddowes*. One of the children died under the age of twenty-one, but the others, including his son *James Eddowes*, attained that age. The testator's widow proved the will and got in

the assets, and the share of each child amounted to 3,683*l*. In 1856, the testator's widow, with the concurrence of *William Bullock*, advanced 1,000*l*. to *James Eddowes* on account of his share, and invested the residue of his share and paid him the dividends until his death in October, 1859. In 1861 the widow and *William Bullock*, under the Trustee Relief Act, transferred into Court the sum of Consols in which the residue of the share of *James Eddowes* had been invested, and by their affidavit upon such payment into Court, they stated that they did not think it would be right for them, even if they had the lawful power so to do, to exercise the discretion given them by the testator's codicil. The question now was as to who was entitled to the fund in Court.

1861.

Re
 EDDOWES.

Mr. *Toller* and Mr. *Hobhouse*, for the Petitioners, who were the other children of the testator, submitted that the trustees not having exercised the power, the share went over to the other children. The testator could not have intended an intestacy in the event of the trustees not exercising the power given them, and the Court would imply a gift and not hold that the testator died intestate with respect to *James Eddowes'* share. They cited *Brown v. Higgs* (a); *Penny v. Turner* (b); *Fordyce v. Bridges* (c).

Mr. *Baggallay*, for the representatives of *James Eddowes*, submitted that there was an absolute gift to *James Eddowes* subject to the power, which, not having been exercised, the gift took effect.

Mr. *Baily* and Mr. *Erskine*, for the testator's widow,

(a) 4 Ves. 708; *S. C.* 5 (b) 2 Phill. 495.
 Ves. 495; 8 Ves. 561. (c) 2 Phill. 497.

1861.

Re
EDDOWES.

and Mr. *Douglas*, for *William Bullock* (the two trustees), cited *Salisbury v. Denton* (a); *Burrough v. Philcox* (b), and *Down v. Worrell* (c).

The VICE-CHANCELLOR.

I am of opinion that there is an intestacy in this case. The testator, by his will, bequeathed his residuary estate for the benefit of all his seven children equally, including his son *James*; but he provided that in case the trustees should be of opinion that one or more of his children should become unfit, then the trustees were to treat the shares of such child or children as if they had died without issue. That power was never exercised, and therefore under the will each of the seven children took a seventh share.

The question however turns upon a codicil by which the testator, after revoking the trusts declared by his will of the share of his son *James*, proceeded as follows—[His Honor read the codicil]—and the question is, whether from this a gift can be implied in favor of any and which of the testator's children. It is often difficult to determine how far, from such a power as is in this case given to the trustees, the Court can imply a gift in default of execution of the power, where there is no gift in express terms, and that difficulty exists in the present case. But from the beginning of the argument I have felt a strong inclination to the conclusion that there is no implied gift in favor of any of the objects of the power.

No less than four implied gifts have been suggested.

(a) 3 K. & J. 529.

(c) 1 Myl. & K. 561.

(b) 5 Myl. & Cr. 72.

First, it has been suggested that there is an implied gift in favor of the other children, excluding *James*. Secondly, that it is an implied gift to *James*, excluding the other children. Thirdly, that it is an implied gift to all, including *James*, equally; and, fourthly, that the implied gift is of one-half to *James* and of the other half to the other children.

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Re
 EDDOWES.

The Court cannot, in the first place, determine whether there is an intestacy or not, and then, upon the supposition that there is not an intestacy, proceed to determine in whose favor the implied gift is; but it must first determine whether there is an implied gift, for if not, there must be an intestacy. The case of *Brown v. Higgs* has naturally been strongly insisted upon by those who contend for an implied gift. In that case Lord *Alvanley* came to the conclusion that there was an implied gift, in default of appointment, to all who might by possibility have benefited by an exercise of the power; and Lord *Eldon*, when the case came before him by way of appeal (*a*), after observing that it was one of the most difficult and doubtful that had ever occurred, came to the same conclusion. In that case, if the power had been exercised, all the children in whose favor it was exercised would have taken absolutely in equal shares, and the power was merely a power to select the objects; and Lord *Eldon* considered that there was a gift to be implied in favor of all the persons who could have been benefited by the exercise of the power. But in this case it is not simply a power to pay over the property to the children of *A.* or the children of *B.*, but it is at the discretion of the trustees to apply the whole, or such part as they may think fit, of the capital or income, or both, for the personal maintenance

(*a*) 8 Ves. 561.

1861.
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Re
EDDOWES.

and support, or otherwise for the benefit of *James*, or otherwise, at the option of the trustees, to apply the whole or such part thereof in augmentation of the shares of the other children of the testator. And how can I, from the terms of this power, draw any inference as to the persons to whom or the shares in which the testator meant the property to go in default of exercise of the power. I confess I think that about as much weight is to be attributed to the argument for all the children, excluding *James*, as to that in favor of *James*, excluding the others, or as to that in favor of all equally, or in favor of all unequally.

I do not find in this case what Lord *Alvanley* and Lord *Eldon* found in *Brown v. Higgs*, that there is anything which will enable me to ascertain the persons in favor of whom, or the shares in which, the testator intended the property to go if this power were not exercised. Of course if I thought this case was governed by the case of *Brown v. Higgs*, I should decide accordingly; but that decision does not apply, because I have not the materials here to imply a gift as in that case. I must, therefore, come to the conclusion that this share is undisposed of.

It has been suggested that in this case we are dealing, not with a particular legacy, but with a share of residue, and that the Court would strive to prevent an intestacy. I confess it has always seemed to me a very dangerous mode of interpreting the words of a testator to put a different construction upon them according as they are used with reference to a particular legacy or to a share of residue. Cases might occur in which a testator gave a particular legacy in certain words, and then used the same words with respect to a gift of his residue; and it cannot be contended that in such a case the same words

are to be construed differently in different parts of the same will. In each case the Court ought to put the fair and reasonable construction on the words used by the testator, without reference to the question whether that construction will or will not occasion an intestacy.

1861.

Re
EDDOWES.

April 25.

22 & 23 Vict.
c. 35, s. 30.
Petition for
Advice, &c. of
Court.

Re LORENZ'S SETTLEMENT.

THIS petition was presented by *W. A. Mundell*, a trustee, under the 30th section of the act to further amend the law of property and to relieve trustees (a), for the opinion, advice or direction of the Court.

The Court will not, upon a petition presented by a trustee or executor under the 30th section of the 22 & 23 Vict. c. 35, for the opinion, advice or direction of the Court, construe an instrument or make any order affecting the rights of parties to property. Such petitions should relate only to the management and investment of trust property.

The petition contained the following statements. By an indenture dated in February, 1859, and made in contemplation of the marriage of Mr. and Mrs. *Lorenz*, of which deed there were three trustees (after reciting that under and by virtue of a deed dated in August, 1857, and made in a Scotch form Mrs. *Lorenz* (then Miss *M'Neil*) was entitled to one-fifth of a sum of 5,000*l.* and to a sum of 500*l.* and contingently to another sum of 500*l.* subject to a power in three trustees (who were also the trustees of that deed) to settle the same in such a manner as they should consider most for the benefit of Mrs. *Lorenz* and so as to exclude all interest, right or control by her husband) Mr. *Lorenz* covenanted with the trustees that he would concur with them in making such settlement as they should think fit of the monies to which Mrs. *Lorenz* was so entitled, and so as to exclude all interest, right or control of her husband or his creditors; and the deed contained a proviso that it should be lawful for the trustees or trustee for the time being of the settle-

(a) 22 & 23 Vict. c. 35.

1861.


*Re*LORENZ'S
SETTLEMENT.

ment so to be made, at the request and by the direction of the said *Mrs. Lorenz*, out of the trust monies, stocks, funds and securities in their hands to lend and advance to *Mr. Lorenz* any sums not exceeding in the whole 600*l.* at such rate of interest as the trustees might deem reasonable without requiring any other security than the bond of *Mr. Lorenz*, and that it should be lawful for the trustees to continue such loan to *Mr. Lorenz* as long as they in their discretion should think proper.

By an indenture dated in August, 1859, the sums of money to which *Mrs. Lorenz* was so entitled were assigned by the three trustees of the indenture of February, 1859, and by *Mr. Lorenz* to two trustees named *Mundell* and *Ray*, upon trusts for the separate use of wife, without power of anticipation, then for children, subject to appointment of *Mr. Lorenz*, and then followed the following proviso:—"Provided always and it shall be lawful for the trustees or trustee for the time being of these presents, at the request and by the direction of the said *B. E. Lorenz* (*Mrs. Lorenz*), with and out of the said trust premises to lend and advance to the said *H. C. Lorenz* (*Mr. Lorenz*) any sum or sums of money not exceeding in the whole the sum of 600*l.* at such rate of interest as the said trustees or trustee shall deem reasonable without requiring any further or other security for the said principal and interest monies than the bond or covenant of the said *H. C. Lorenz*; and further, that it shall be lawful for the trustees or trustee (subject nevertheless to the direction in writing of the said *B. E. Lorenz*) to continue such loan to the said *H. C. Lorenz* as well after the decease as in the lifetime of the said *B. E. Lorenz* (*Mrs. Lorenz*) as the said trustees or trustee in their or his discretion shall think proper."

Mr. *Lorenz*, being in prison for debt, did not execute this deed. Mr. *Ray*, one of the trustees, also did not execute it and refused to act in the trusts. Mr. *Bell* was subsequently appointed a trustee in his place, but he also refused to act.

1861.

Re
 LORENZ'S
 SETTLEMENT.

Mr. *Lorenz* was in April, 1859, arrested for debt and had since been discharged under the Insolvent Act.

Mr. *Mundell* (the Petitioner), the only acting trustee under the deed of August, 1859, had been served by the solicitors of Mr. *Lorenz* with a direction in writing by Mrs. *Lorenz*, requesting him to advance 300*l.* to Mr. *Lorenz* on his bond; and the solicitors for Mr. *Lorenz* having threatened that, unless he made the advance in accordance with the power in the deed, which they contended was a compulsory and not a discretionary power, they would file a bill against him, Mr. *Mundell* presented the present petition, which, after containing a correspondence which had passed between the parties, and from which it appeared that Mr. *Mundell* did not think it advisable to make the advance, concluded as follows:—"Under the circumstances above set forth, the said *W. Adam Mundell* is desirous of acting under the direction of this honorable Court."

Mr. *Pearson* appeared in support of the petition.

Mr. *Toller* for the Respondents.

THE VICE-CHANCELLOR.

This is an application by the trustee under a deed asking the opinion and advice of the Court under the 30th section of Lord *St. Leonard's* Act. The petition,

1861.
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Re
LORENZ'S
SETTLEMENT.

after the statement of facts, concludes thus:—"Under the circumstances above set forth, the said *W. Adam Mundell* (the trustee) is desirous of acting under the direction of this honorable Court." This is not the proper form of framing such a petition. It ought to propound some definite question upon which the advice of the Court is desired.

I presume that the question upon which the trustee is desirous of being advised, is, whether, according to the true construction of the settlement, he is bound to make an advance out of the trust funds to Mr. *Lorenz*, or whether there is only a discretionary power to make such advance. It appears that the opinion of the trustee himself is (as I understand the petition) that, if there be only a discretionary power, it would not be wise or proper to make the advance. Therefore, I am asked to put a construction upon this instrument, and so decide a question materially affecting the rights of the parties.

Now, my understanding of that section of the act is, that it was intended by the legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties inter se, otherwise the effect would be, that a deed or will involving the most difficult questions, and relating to property to an amount however large might be construed, and most important rights of parties decided, by a single Judge, without any power of appeal whatever. This I am satisfied the legislature never intended.

It has, however, been suggested, that this case comes strictly within the language of the 30th section, which is "any question respecting the management or administration of the trust property or the assets of any testator or intestate," because it is contended that the Court would not be deciding who are entitled to the trust fund, but only as to a mode of investing it by an advance to the husband. But the question whether the husband has a right to the advance is not a question of investment, but a question by the decision of which the rights of parties would be very materially affected; and if the question is to be decided by the Court, it must be decided upon a bill. I cannot advise the trustee upon such a question.

1861.

Re
 LORENE'S
 SETTLEMENT.

It is true, that, in some cases, the Court has (unadvisedly, as I think), upon a petition under this section given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done.

Under these circumstances, I shall give no costs to the Petitioner, the cestuis que trust to have their costs out of their trust fund.

1861.
April 25.

*Railway
Company.
Notice to take
Land.
Deposit of Value
in Bank.*

GILES v. LONDON, CHATHAM AND DOVER
RAILWAY COMPANY.

Where a railway company served a land-owner with a notice of their intention to take a portion of certain property belonging to him for the purposes of their railway, and the land-owner served upon the company a counter notice, requiring them to take the whole of such property:

Held, that the company could not take possession of any portion of the property until they had deposited the value of the *whole* property in the bank; and that it was not sufficient for them to deposit the value of that portion only of the land taken by them.

ON the 15th of January, 1861, the Plaintiff was served by the *London, Dover and Chatham Railway Company* with notice that they required to purchase or take all the lands and hereditaments specified in the schedule annexed to the notice of which he was possessed in fee simple.

The land described in this schedule formed part of the site of a shed belonging to and forming part of a dwelling-house, No. 39, *John Street, Holland Street, Blackfriars Road*, and which shed was used as a workshop by the occupier of the dwelling-house. The Plaintiff, being willing to sell and convey the whole of the dwelling-house and appurtenances, including the shed, to the company, on the 12th of February 1861 served the company with a notice requiring them, under the provisions of the Lands Clauses Consolidation Act, to take the whole of his property there, of which the piece of land, the site of the shed, formed part, and claiming 629*l.* for the same.

The company, however, paid a deposit of 50*l.* into the bank, as the value of the small piece of land they had given notice of their intention of taking; and on the 15th of February, 1861, served the Plaintiff with a bond for the payment of 50*l.* to him.

The Plaintiff thereupon filed his bill, alleging, that

the company intended to enter into and take possession of a part of his land; that he was able and willing to sell to the company the whole of his dwelling-house and premises, and insisting, that, having required the company to purchase and take the whole of his land, the company were not entitled to take part only, and praying that the company might be restrained by injunction from so doing.

1860.
GILES
v.
LONDON,
CHATHAM, &c.
RAILWAY
COMPANY.

Mr. *J. H. Palmer* and Mr. *Speed* appeared for the Plaintiff.

Mr. *Baily* and Mr. *Kekewich*, for the railway company, submitted that where a company had served notice to take a portion of certain premises, and the landowner served them with a counter notice to take the whole, it was only necessary for the company before entering on the portion comprised in their notice to deposit the value of such portion in the bank, and that the company was not bound to deposit the value of the whole; any other construction of the act would operate most oppressively against railway companies serving such notices.

No reply was called for.

The VICE-CHANCELLOR.

Though this question lies within a limited compass, it is one of considerable importance both to railway companies and to landowners.

With respect to the argument used by the counsel for the Defendants, that the construction of the act contended for by the Plaintiff would operate hardly upon

1861.
GILES
v.
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CHATHAM, &C.
RAILWAY
COMPANY.

railway companies, it is to be recollected that these companies are armed with the power to compel individuals, whether they will or no, to give up their property for the purposes of the company. If a man has land within the limits prescribed by the special act, however reluctant he may be to part with it, however much he may be attached to it, he is compelled to relinquish it for a pecuniary compensation at the bidding of the company; and, therefore, upon a question of hardship, if hardship there be, it ought to fall upon the company rather than upon the landowner; and certainly the construction contended for by the Defendants might operate very hardly upon the landowner.

In order to prevent the mischief that might arise to the landowner if he were obliged to give up to the company a part only of his house, or other building or manufactory, retaining the mutilated remnant, the 92nd section was introduced into the Lands Clauses Consolidation Act, by which he is entitled, if the company give him notice of their intention to take a part, to require them to purchase the whole. And it is not disputed that the present case is within the operation of that section. On the other hand, in order to prevent the inconvenience which might arise by delaying the construction of the railway, if the company were absolutely precluded from taking possession till the nature and extent of the landowner's interest was ascertained, and the amount of the compensation to be paid was finally agreed upon or assessed, the 85th section enables the company to take possession on depositing the value and giving a bond for an equal amount, such deposit and bond being intended by way of security. Now if the company have given notice of their intention to take certain land, it is clear that they would not be entitled

under the 85th section to take possession of a part of the land comprised in their notice upon depositing and giving a bond for the value of that part only. They would have no right to take possession of a single square yard without depositing and giving a bond for the value of the whole. And it appears to me that the effect of the 92nd section is this :—that if the company serve a notice of their intention to take a part of a man's house, or other building or manufactory, and he serves them with a counter notice requiring them to take the whole, the right of the landowner and the obligation of the company are thereby placed on the same footing as if the company had given notice of their intention to take the whole. If such notice to take a part, and such counter notice requiring them to take the whole, have been given, it is clear that the company could not summon a jury to assess the compensation for the part only; the landowner would be entitled to require that the compensation for the whole should be assessed by the jury at once, and not by two separate assessments made by two several juries. That was decided in *St. Thomas's Hospital v. Charing Cross Railway Company* (a). And I am of opinion, that in such a case, the company have no right to take possession of the part upon depositing and giving a bond for the value of that part only, but that they must deposit and give a bond for the value of the whole. Any other construction might be attended with great injury to the landowner, for the part comprised in the company's notice might be the part most essential to the occupation and enjoyment of his house, or to the carrying on of the business of his manufactory; and to take possession of that part on a partial deposit and bond, leaving the remainder on his hands without the security of any

(a) 7 Jur. N. S. 256.

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deposit or bond, until it suited the company to summon a jury to assess the value of the whole, would be most unjust towards him. In my opinion the construction contended for by the Plaintiff is the just and true construction.

The language of the 85th section, taken in conjunction with the 84th, appears to me to be entirely in accordance with this view. The 84th section enacts that the promoters of the undertaking (i. e. the company) shall not, except by consent of the owner, enter upon "*any lands which shall be required to be purchased,*" until they have paid to the owner or into the bank the purchase-money or compensation agreed or awarded to be paid for the land; and then the 85th section provides that if the promoters (i. e. the company) shall be desirous of entering upon "*any such lands*" before any agreement shall have been come to or an award made or verdict given for the purchase-money or compensation to be paid by them "*in respect of such lands,*" it shall be lawful for the company to deposit in the bank, by way of security, either the amount claimed by the owner, or such a sum as shall be determined by a surveyor appointed by two justices, to be the value "*of such lands*" (that is of the lands required to be purchased), and also to give a bond for an equal sum, and then the company may enter upon and use such lands. Throughout the 85th section the words "*such lands*" mean the lands mentioned in the 84th, viz. "*the lands which shall be required to be purchased.*" The amount of the deposit and of the bond is to be the value of *the lands which are required to be purchased.* And when, as in the present case, the company have given notice of their intention to take a part of a house, or other building or manufactory, and the owner has given a

counter notice requiring them to purchase the whole, the lands which are required to be purchased are the whole, and not that part only which is mentioned in the company's notice.

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I am of opinion that the Plaintiff is entitled to an injunction to restrain the company from entering upon any part of the Plaintiff's premises, unless and until the company shall have paid to the Plaintiff, or into the bank (as the case may be), the amount of purchase-money or compensation which may be agreed upon by the parties, or awarded by an arbitrator or by a jury; or else shall have deposited the value of the whole of the premises, to be determined by a surveyor appointed by two justices, and given a bond for a like amount, under the 85th section.

1861.

May 23.

Mortgagor.
Mortgagee.
Foreclosure.
Arrears.
Outstanding
Term.
Merger.

SHAW v. JOHNSON.

I. Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot in foreclosing have an account of arrears of rent for more than six years.

II. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears; and it is the same if there is an agreement that an outstanding term shall be assigned in trust.

III. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict.

c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt.

THIS was a foreclosure suit; and on the hearing the question was, whether the mortgagee was entitled to have a general account of arrears of interest, or whether it was to be limited to six years' arrears.

The material circumstances of the case were as follows:—The actual arrears of interest were far exceeding six years. The mortgage deed contained the ordinary covenant to pay principal and interest. There was at the time of the mortgage an outstanding term in one *Paine* as trustee for the mortgagor, to attend the inheritance. By the mortgage deed it was agreed that this term should be assigned to another person as trustee for the mortgagee to secure the mortgage debt and interest; and a deed of assignment was actually prepared, to which *Paine* was party as assignor and the new trustee as assignee; but this deed was never executed by either party. There were first and second mortgagees.

Mr. Glasse and *Mr. Boyle*, for the first mortgagee.

We are entitled to a general account. First. Although we admit that where there is simply a mortgage, the mortgagee is barred by the Statute of Limitations against recovering more than six years' interest against

the land ; yet it has been held that under the 3 & 4 Will. 4, c. 42, s. 3 (1842), the mortgagee may recover generally without limit as to time in his action upon the covenant. And when there is a covenant to pay principal and interest, this Court will tack the relief under the covenant as against the land ; *Du Vigier v. Lee (a)*.

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Secondly. Even if that were not so, here there is a term in a trustee, and that takes it out of the statute. It will be said there is no actual assignment, and therefore no express trust. But an agreement to assign upon trust creates an express trust as much as an actual assignment.

Mr. *Baily* and Mr. *Renshaw*, for the mortgagor.

The account of arrears of interest must be limited to six years.

I. The remedy by action on the covenant is not tacked in this Court as against the land ; *Hunter v. Nockolds (b)*.

II. There is no trustee and no term ; the agreement may constitute an equity on the part of the mortgagee, and a constructive trust ; but a constructive trust does not take the case out of the Statute ; and till there is a legal estate in somebody for the mortgagee, there is clearly no express trust.

Mr. *Anderson* and Mr. *Shebbeare*, for the trade assignees of the second mortgagee, who had become bankrupt, adopted the same view.

In addition to the points already argued, here the term could not be assigned in trust for the mortgagee.

(a) 2 Hare, 326.

(b) 1 M. & G. 640.

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At the time of the mortgage it was in *Paine* as a satisfied term, upon trust to attend; it was therefore merged by the statute, the 8 & 9 *Vict.* c. 112. The attempt to revive it by an agreement was futile; it was gone, merged in the inheritance.

The following cases were cited:—*Hughes v. Kelly* (a); *Sinclair v. Jackson* (b); *Cox v. Dolman* (c); *Du Vigier v. Lee* (d); *Snow v. Booth* (e).

THE VICE-CHANCELLOR.

This is a bill of foreclosure; and the question is, whether, in the decree, an account of interest is to be directed for the full period, or whether it is to be limited to six years. The question depends upon the 42nd section of the Statute of Limitations, 3 & 4 *Will.* 4, c. 27, and the 3rd section of the 3 & 4 *Will.* 4, c. 42. Now there is no question about this. If there be a mortgage simply, laying aside all questions of the effect of any covenant to pay, or of any term by way of collateral security, there can be no doubt that the mortgagee can only recover six years' arrears of interest, by the effect of the 42nd section of 3 & 4 *Will.* 4, c. 27. But in this deed there is a covenant to pay the principal and interest. And then the other statute, the 3 & 4 *Will.* 4 (1842), c. 42, s. 3, has to be referred to, by which it is enacted, that in an action to recover upon the covenant, the mortgagee may recover twenty years' arrears of interest. In the case of *Du Vigier v. Lee* (d), it was held, that the effect of the two statutes is, that the mortgagee, where there is a covenant to pay principal and interest, may, on a bill of foreclosure, recover

(a) 3 Dr. & War. 482.
 (b) 17 Beav. 405.
 (c) 2 De G., M. & G. 592.

(d) 2 Hare, 326.
 (e) 2 Kay & John. 132.

the whole arrears unpaid. *Hunter v. Nockolds* (a) was the case of the grant of an annuity charged upon land and secured by covenant; and on the petition of the grantee an inquiry was directed whether the petitioner was entitled to any and what annuity and charge on the land. The Master limited the amount to six years' arrears, and Lord *Cottenham* held that the finding was right, the only question being how much was a charge on the land. In page 650, Lord *Cottenham* uses expressions which seem to imply an admission that where there is a mortgage with a bond or covenant, the mortgagee may, on a bill of foreclosure, have an account of interest for twenty years, to prevent circuity of action. But the effect of his whole judgment is, that notwithstanding the bond or covenant, the mortgagee cannot claim against the land more than six years' arrears of interest.

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The next question is this:—suppose there is a term of years assigned to a trustee expressly in trust for the mortgagee to secure the mortgage money and interest, what is the effect of that term? That question depends upon the 25th section of the Limitation Act. And whatever might be the construction I should put upon it if the matter were *res integra*, it appears to me that *Cox v. Dolman* established that where a term is created for the express purpose of securing the mortgage money and interest, the effect is that the Limitation Act does not operate, because there is an *express trust*. In the present case, however, there is not the creation of a term, but there was subsisting at the time of the mortgage a satisfied term in *Paine*, which had been limited to attend the inheritance; and by the mortgage deed it was agreed that the term should be assigned by *Paine* to a new trustee for the mortgagee, upon trust to

(a) 1 M. & G. 640.

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secure the principal and interest; and if *Paine* had executed that assignment, there would, I think, be an express trust within the principle of *Cox v. Dolman*.

But it is contended on the part of the mortgagor, that as *Paine* never executed the deed of assignment, there is no express trust. But it is a principle of the Court, that what is agreed to be done is to be considered as done, and I think it would be contravening that principle to say that this case is different from that of an actual assignment. It is clear that the mortgagee would have a right to compel the assignment of the term on the express trust. And it appears to me that the effect of the agreement is the same as if the assignment had been actually made.

But it is further contended, that the term became merged by the 8 & 9 *Vict.* c. 112. The intention of that act was, that all mere dry satisfied terms, made attendant on the inheritance, should merge, but not terms assigned or agreed to be assigned as a protection to a mortgagee or purchaser. If this had been a dry attendant term, no doubt it would have merged; but, by the mortgage deed, the parties had agreed that it should be clothed with an active trust. I think that takes it out of the statute.

I am of opinion that the account of interest must be taken generally.

1861.
June 3.

*Benefit
Building
Society.
Directors.*

In re KENT BENEFIT BUILDING SOCIETY.

THIS was an adjourned summons under an order for winding up a benefit society. The society in question had been registered and inrolled under the name of "*The Kent Benefit Building Society.*" The rules of the society as issued were headed :—

"*The Kent Freehold Land Society*

" inrolled as

"*The Kent Benefit Building Society.*"

The following were the material rules :—

" I. That this society be denominated '*The Kent Benefit Building Society.*'

" II. The object of this society shall be, to raise a *stock or fund* to enable each member to receive out of the funds of the society the *amount or value of his share or shares, to erect or purchase one or more dwelling-house or houses, or other real or leasehold estate, to be secured by way of mortgage to the society* until the amount or value of his share or shares shall have been repaid to the society, with all former and other payments incurred in respect thereof; each share not to exceed the sum of 30*l.*"

" XIX. That all money *not employed* shall from time to time *be invested by trustees* in such manner and upon such legal security as the board shall direct."

trustees was *ultra vires*, and the trustees could not compel contribution among the shareholders to recoup their loss.

A society was formed, certified and inrolled as a benefit *building* society; its rules did not indicate an intention that it should act as a benefit *freehold land* society.

The directors bought land, and mortgaged it, to secure money borrowed for the purchase, and certain members, acting as trustees, covenanted to pay the mortgage debt, and under that covenant they had to pay money. It did not appear that every member acquiesced in or was even cognizant of the transaction.

Held, that the act of the directors and

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"XXVIII. That any member upon receiving the share advanced shall execute to the trustees for the time being a legal mortgage of the property offered as security to secure to them the sum which he may then be indebted to the society, with such premiums for prior advance, if any, as the committee for the time being shall determine (that premium for prior advance be not charged except in case of a very favorable purchase, and then only to equalize the different purchases, *such sum may be placed upon each allotment as the committee may decide*)," &c.

XXXVII. Of which the marginal note was : " Power to borrow money *on any terms approved by the executive committee.*"

In the course of the year 1853 the committee purchased an estate called "The *Chatham Estate*," and at a meeting held on the 8th of December, 1853, allotments of a portion of that estate were ballotted for among the members, and on the 4th of January, 1854, it was reported to the committee that certain members (eight in number) had taken up their allotments. In order to raise money to complete such purchase, Messrs. *Hammond* and *Brown*, the present claimants, as trustees for the particular purpose (it did not appear that they were the general trustees of the society), executed a mortgage of the said estate, containing a power of sale, and also the usual mortgagor's covenant to pay principal and interest. It did not appear that this transaction had ever been communicated to the society at any general meeting until the adjourned general meeting held on the 25th day of October, 1854, after the difficulties of the society had arisen, and it did not appear what members were present at this meeting. The mortgagees afterwards sold the estate under their power of sale for a sum

insufficient to pay the mortgage debt, and recovered the balance from *Hammond* and *Brown*. An order for winding up the society having been obtained, *Hammond* and *Brown* claimed to be entitled in account for the sum so recovered from them, and for contribution on the part of all the other shareholders. The Official Manager having objected, in chambers, that the purchase and mortgage were *ultra vires*, the matter was adjourned into Court.

Mr. *Haig* for the claimants. The course adopted by the society was, in fact, notorious to all the members, although they did not all attend any general meeting; therefore the committee were justified in acting as they did, and the claimants, who acted under their authority, were entitled to the indemnity they claim.

But the question did not turn on acquiescence alone; the transaction was not *ultra vires*. He referred to the Benefit Societies Act, 6 & 7 Will. 4, c. 32, preamble, and section 1 (a). There the words are "the

(a) 6 & 7 Will. 4, c. 32, s. 1, is as follows:—"Whereas certain societies, commonly called building societies, have been established in different parts of the kingdom, principally among the industrial classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies and the property obtained therewith: Be it therefore enacted by the King's most excellent Ma-

jesty, by and with the advice and consent of the lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any number of persons in Great Britain and Ireland to form themselves into and establish societies for the purpose of raising by the monthly or other subscriptions of the several members of such societies, shares not exceeding the value of 150*l.* for each share, such subscriptions not to exceed in the whole 20*s.* per month for each share,

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amount or value" of his shares; now the word "amount" describes the share in money, the word "value" must mean something else, otherwise the legislature would not have added it; it means the equivalent in value of the share; not the share in money, why should not that include land? When you return a shareholder his share in money, that is the "share" itself, not its value. If you give him something else, such as land, then you are giving him its *equivalent*, its "value." The directors therefore were authorized to convert the shares into land, by the purchase of allotments, and if so the transaction was regular.

a stock or fund for the purpose of enabling each member thereof to receive out of the same funds of such society the amount of value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses or other real or leasehold estate, to be secured by way of a mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society, with the interest thereon, and all fines or other payments incurred in respect thereof, and to and for the several members of each society from time to time to assemble together, and to make, ordain and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such societies so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this act and to the general

laws of the realm, and to impose and inflict such reasonable fines, penalties and forfeitures upon the several members of any such society who shall offend against any such rules as the members may think fit, to be respectively paid to such uses for the benefit of such society as such society by such rules shall direct, and also from time to time to alter and amend such rules as occasion shall require, or annul or repeal the same, and to make new rules in lieu thereof under such restrictions as are in this Act contained; provided that no member shall receive, or be entitled to receive from the funds of such society any interest or dividend by way of annual or other periodical profit upon any shares in such society until the amount of or value of his or her share shall have been realized, except on the withdrawal of such member, according to the rules of such society then in force."

Mr. *Glasse* and Mr. *Shebbeare*, for the Official Manager.

This is not a "freehold society," but a "benefit building society;" the operation of these two classes of societies is quite distinct. The benefit freehold land society is formed for the express purpose of buying and allotting land.

The *modus operandi* of a benefit building society is quite different. The intention of that is, that shareholders, if they wish to purchase and build on land, shall be entitled to have the money advanced by the society on mortgage of the land; and in effect pay off the mortgage debt, by their subscriptions. No one ever heard of a benefit building society operating generally in any other way.

The argument, that the act authorizes the purchase of land under the words "value of the shares," is too refined. If that argument were good; if you are to assume that the word value means anything more than the amount in money value, directors might equally, under so wide a construction, lay out the funds in any other commodity. It is too much to infer from the words "value of shares" a power not found in the rules to buy land, in a company expressly constituted for a totally different purpose, and by custom always acting in a different way.

Mr. *Roxburgh*, for some contributories, left the argument to the Official Manager.

Grimes v. Harrison (a); *Morgan's Case* (b) were cited.

(a) 26 Beav. 435.

(b) 1 M. & G. 225.

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The VICE-CHANCELLOR.

In this case every argument that ingenuity could suggest has been used by counsel for the claimants; but I think the claim cannot be supported. I do not say that it would be illegal for a society such as this, assuming that all concurred, to purchase and allot land. But the question is here, whether under the circumstances of the case as between the trustees and all the other members the trustees can compel each individual member to contribute to recoup the loss incurred by the trustees.

This society is a benefit building society; it is inrolled as such, and never was inrolled as a benefit freehold land society. The difference is obvious, it is pointed out in *Grimes v. Harrison*—[His Honor referred to the judgment.]—The object of a benefit building society is, that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and, ultimately, making it absolutely his own, by paying off the mortgage out of his subscriptions.

That being so, it appears that in this case the committee (I will not say against the will of general meetings, but without their actual consent) considered it expedient to make the society a freehold land society. As I have observed, I do not say that the society could not buy land; *Grimes v. Harrison* is an authority that they may; but in that case as in this the design of the committee was to convert the society inrolled as a benefit building society into a freehold land society.

It is contended that the intention of the rules was,

that the society should be a freehold land society ; that it should operate as such, by purchasing land and making allotments among the members. Now a good deal of the language of the rules of this society is of an ambiguous character, and presents considerable difficulties in attempting to construe it. But the first rule at least is clear, that the society is to be "The *Kent Benefit Building Society*," and under that title it was certified and inrolled. The clause defining the business of the society is framed in accordance with the language of the first clause of the act of parliament. Then, in the second rule, I cannot doubt that the words "a stock" or "fund" are governed by the word "raising." Then what is the stock or fund ? It consists of money raised by subscription ; the stock or fund is directed to be used for enabling each member to receive out of the fund the *amount or value* of his share.

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It has been argued, that the word "amount" means money, and the word "value" means the value of the share in the form of land ; that it would be improper to treat the word "value" as merely equivalent to "money." But I cannot see any impropriety in using the term, the value of a share, as describing its amount in money ; and I find, in the rules themselves, the same words used in the very same clause, in reference to the repayment of a sum of money.—[His Honor referred to the latter part of the 2nd clause, and referred then to 28th clause.]

Now I do not find in the rules of this society any indication of an intention that the society itself should purchase land and constitute that land its stock or fund.

This society was, in its origin, a benefit building

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society; it was enrolled as such; and is such a society and no other according to its rules.

Now the transactions were these:—At an early period the directors commenced purchasing land, and paid for it by borrowing money, secured by mortgage on the land purchased; and it is clear that the clause of the rules authorizing investment on the security of land did not authorize this transaction. The committee might, under that rule, invest upon mortgage the unemployed funds of the society; but that power was no authority for borrowing money to buy lots of land. They did so, however, and if no loss had occurred there would have been, of course, no question. But loss resulted; and then the question arises, what are the rights of the persons who, acting as trustees for the society in the matter of the mortgage, covenanted to pay, and have had to make good the deficiency on the sale by the mortgagee? It was in 1853 that the committee determined to purchase land; they had not sufficient money, and they borrowed it, and secured the repayment by mortgage of the land. The present claimants were called upon to attend a meeting of the committee, for the completion of the transaction. It does not appear that they were the general trustees of the society; but they were appointed, or acted, as trustees for that transaction. The result of the whole was, a mortgage of the land for 1,000*l.*, and the present claimants covenanted to pay. Then the mortgagees sold, and the property did not value the full amount; and the mortgagees brought their action and recovered the deficiency against these trustees under their covenant.

Now, can they say, in the winding-up of the society,

that, in this transaction, the committee and the trustees were so far agents of the society, that, having so expended money for it, they are entitled to call upon every shareholder to contribute? The real question is, was the transaction authorized by the rules of the society? I am of opinion that it was not. If the claimants could show that each individual member concurred, it might be different; but that is not shown. And the claimants cannot establish their claim against the society as a body, if they cannot against each individual member. The reasonableness and fairness of the transaction cannot uphold it, if it was *ultra vires*; that is the point decided in *Morgan's Case*; nor will its having been disclosed to a general meeting (assuming that it was so) uphold it; whatever effect that disclosure might have as against any of the persons attending that general meeting, it could have no effect as against any individual member not present.

The claim must be dismissed.

Costs of the Official Manager out of the estate.

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~~~~~  
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Jan. 17, 18, 19,  
21, 22.  
March 23.

*Conversion.*  
*Notice to treat.*  
*Railway Com-*  
*pany.*

### HAYNES v. HAYNES.

**T**HIS cause, which was for the administration of the trusts of the will of *John Haynes*, now came on upon further consideration.

Where a notice to treat for the purchase of certain property was served by a railway company on the owner of such property, and nothing further was done until after the death of the owner, who by his will had specifically devised the property comprised in the notice to treat: *Held*, 1st, that the mere notice to treat served by the company did not constitute a contract by the owner for the sale of the property; and 2ndly, that if it did, a bill for specific performance would not lie against the owner; and therefore that the notice to treat did not effect conversion of the property comprised in the notice.

The testator *John Haynes*, being possessed of considerable freehold and leasehold property in houses and land, at *Lower Mitcham*, in the county of *Surrey*, and elsewhere, by his will dated the 6th day of November, 1850, specifically bequeathed the same to his children, giving one house specifically to one child, and another house to another child, and so on, and devised and bequeathed his residuary real and personal estate to the Plaintiffs and one of the Defendants.

In September, 1853, the *Wimbledon and Croydon Railway Company* served on the testator *John Haynes* a notice of their intention to take several of his freehold and leasehold houses at *Lower Mitcham* (which the testator had so specifically devised by his will), for the purposes of their railway; but nothing further was done with respect to such notice during the testator's lifetime.

The testator *John Haynes* died in January, 1854.

In December, 1854, after the testator's death, the *Wimbledon and Croydon Railway Company* being de-

sirous of entering on the property comprised in their notice, paid into the Bank of *England* the sum of 1,910*l.*, the sum determined on as the value of the same by a surveyor appointed by two justices under the 85th section of the Lands Clauses Consolidation Act, 1845, and gave the usual bond and entered into possession. In 1856 the company issued a warrant to the sheriff of *Surrey* to settle the amount of compensation to be paid for the land, and the sum of 2,300*l.* was the amount awarded, and that sum was duly paid into Court by the company.

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The present suit having been instituted by two of the residuary legatees under the testator's will for administration, the question arose whether the notice which had been served on the testator during his lifetime by the railway company (nothing further having taken place till after the testator's death) had the effect of converting the freehold estates comprised in such notice into personalty and converting the leaseholds into money, so as to make the compensation-money paid for such property fall into the residue instead of passing under the specific devises and bequests contained in the will.

Mr. *Bathurst* for the Plaintiffs, two of the residuary legatees.

The notices served by the railway company on the testator had the effect of converting the realty comprised in such notices into personalty. After the notices had been once given neither party could withdraw without the consent of the other; *Rex v. Hungerford Market Company* (a); *Rex v. Commissioners for Improving Market Street, Manchester* (b), In *Stamps v. Birmingham*

(a) 4 B. & Adol, 327.  
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(b) 4 B. & Adol, 333, n.  
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*ham and Wolverhampton and Stour Valley Railway Company* (a), Lord *Cottenham*, in his judgment, said :—  
 “ Now I have decided, and decided generally in all the cases where the question has arisen, that where a company gives notice to purchase and where they have described the quantity of land that they require, by that means they enter into a contract with the landowner to make the purchase, and that, therefore, they cannot afterwards depart from it.” By the notice a contract is completed (or speaking more strictly), the parties are placed in the same position as if there had been a complete contract, of which either party can compel the specific performance; and all that remains to be done is to determine the amount of the compensation-money. Lord *St. Leonards*, in his treatise on *Vendors & Purchasers*, lays it down that “ the notice forms a binding contract and creates the relation of vendor and purchaser” (b), and that “ where a person is competent to sell and a binding contract, or what is tantamount to it, is made under an act giving a company power to take land, the landowner’s interest is converted into personalty and will go to his personal representative, notwithstanding a devise by him before the sale of the estate” (c); and then he goes on to state certain exceptions to the rule, but none of those exceptions apply to the present case. Whether the sale is compulsory or voluntary on the part of the landowner makes no difference. The cases show that there is to all intents and purposes a binding contract created between the company and the landowner as soon as the company have served the notice to take the land.

He also cited *Tawney v. Lynn and Ely Railway Com-*

(a) 7 Ha. 251; *S. C.*, on appeal, 17 Law J. N. S. (Chan.) 431. (b) Page 62 (13th edit.) (c) Page 66 (13th edit.)

*pany (a)*; *Queen v. Birmingham and Oxford Junction Railway Company (b)*; *Marquis of Salisbury v. Great Northern Railway Company (c)*; *Hill v. Great Northern Railway Company (d)*; *Ex parte Hawkins (e)*; *Richards v. Attorney-General of Jamaica (f)*.

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Mr. Glasse and Mr. Joyce, for a Defendant in the same interest as the Plaintiff, referred to *Ex parte Flammank (g)*; *In re Harrop (h)*; *Edinburgh, &c. Railway Company v. Leven (i)*; *Collingwood v. Row (k)*.

Mr. Caldecott, for one of the Defendants who contended against conversion.

The doctrine of conversion rests upon the *agreement* by the testator to sell—equity regarding that as done which has been agreed to be done,—but the agreement must be clear, and such as evinces an intention to revoke the devise made by the will (*l*). Now, it is said that there is such agreement to sell in this case, first, because upon notice to take by the company this Court will enforce specific performance of the landowner's obligation to sell, which in effect amounts to a contract to sell; and secondly, the notice by the company creates the relation of vendor and purchaser, and there is in fact a contract to sell by the landowner, as shown by the cases.

There is, however, no case in which specific performance under such circumstances, viz., simply notice by company, has been decreed; and in one case, *Hill v. Great Northern Railway Company (m)*, the Vice-Chan-

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| (a) 4 R. C. 615.        | (h) 3 Drew. 726.        |
| (b) 15 Q. B. 634.       | (i) 1 Macq. 284.        |
| (c) 17 Q. B. 840.       | (k) 26 L. J. Ch. 649.   |
| (d) 1 Jur. N. S. 102.   | (l) Sugden's V. & P. p. |
| (e) 13 Sim. 569.        | 160 (13th edit.)        |
| (f) 6 Moore, P. C. 381. | (m) 1 Jur. N. S. 102.   |
| (g) 1 Sim. N. S. 260.   |                         |

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cellor refused such relief. Lord *St. Leonards*, in his treatise on *Vendors & Purchasers* (a), seems to be of opinion that such relief could be had, but not one of the cases cited goes in support of the proposition excepting the case of *Walker v. Eastern Counties Railway Company* (b), and there the landowner had signified his desire to sell by delivering a claim for purchase-money and compensation; and moreover, that case is distinctly disapproved of by Lord *Cottenham* in *Adams v. London and Blackwall Railway Company* (c).

And as to the authorities cited for the proposition, that upon notice by the company there is a complete contract, and the relation of vendor and purchaser is established, there is no case the decision of which rests at all upon such proposition, though in some of the cases expressions may be found speaking of the landowner and the company as contracting parties and as vendor and purchaser. *The Queen v. Birmingham, &c. Railway Company* (d) and *Marquis of Salisbury v. Great Northern Railway Company* (e) merely decide that the notice given by the company binds them to this extent, that the notice cannot be withdrawn and that it may be acted upon by the landowner after the expiration of the time limited by the act for the giving of notices by the company. Lord *St. Leonards*, in his *Vendors & Purchasers*, lays down this proposition (p. 62) and (in note 5) cites two authorities, but neither of those cases supports the proposition. In *Doo v. London and Croydon Railway Company* (f) there was an agreement to sell before the act passed, and the landowner after the act had passed required the company to take the lands

(a) Page 62 (13th edit.)

(b) 6 Ha. 594.


(c) 2 M. & G. 118; see  
 p. 129.

(d) 15 Q. B. 634.

(e) 17 Q. B. 840.

(f) 1 Railw. Cases, 257.

on the agreed terms; and the decision in the case of the *Queen v. Birmingham Railway Company* (a) has been before mentioned. It may be conceded that, upon notice given by the company, the legislature places the landowner for some purposes in the same position as if he had contracted to sell; but this is insufficient to establish conversion, for there would be no *animus revocandi* on the part of the landowner, which must be as clear as the *animus disponendi*, and the legislature in imposing upon the landowner the position of a vendor does so only *for the purposes of the act*, and cannot be intended to have altered the relation existing between the testator and his devisee. To give the notice by the company the effect of conversion would be to give to a third person the power of revoking a testator's will.

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The practical inconvenience of so holding would be very great; a testator might on one day have carefully distributed by will his property among the different members of his family, and the next morning he might receive a notice from a railway company which, by revoking material dispositions in his will, would have the effect of disarranging all the provisions he had made for his family.

*Mr. Round, Mr. Archibald Smith and Mr. Roxburgh* for other Defendants in the same interest.

The VICE-CHANCELLOR reserved judgment.

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The VICE-CHANCELLOR.

The question in this case is, whether the notice given by the railway company had the effect of converting the

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(a) 15 Q. B. 634.

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testator's interest in the freehold and leasehold houses and lands specified in the notice into money, and revoking the devises and bequests of those houses and lands, or (to speak more accurately) adeeming the subjects devised and bequeathed.

The residuary legatees contend that it had that effect, and their argument is this :—They insist that the usual notice to treat served by a railway company constitutes a contract between the landowner and the company for the sale and purchase of the land ; and having attached the name of “ contract ” to the transaction, it is a short and easy step to the conclusion ; for they say (and they say truly) that if *A.* and *B.* have entered into a contract for the sale and purchase of land, the Court of Chancery, which enforces the contract by decreeing specific performance, regards the lands as having become in equity, by virtue of the contract, the property of the purchaser, and treats the vendor as trustee of the land for the purchaser, so that the vendor's prior beneficial interest in the land has ceased to exist in him, and he has become only entitled to the purchase-money ; in other words, there is a conversion.

The first question, therefore, is, how far the residuary legatees are justified in their contention that the notice by the railway company constitutes a contract.

I may observe that the only question with which we have any concern in the present case is, what is the effect of the notice with respect to the landowner. Whatever may be its effect with respect to the company giving the notice, the only question is, whether the landowner, receiving the notice, and having done no act whatever, but having remained entirely passive and

silent, has entered into a contract for the sale of his land.

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Now what is a contract, and what is necessary to constitute a contract? A contract, according to the well-known definition of Sir *William Blackstone*, is an agreement upon sufficient consideration to do or not to do a particular act. According to this definition it is an agreement. Now in order to constitute an agreement or contract, two things are requisite,—1stly, the will; and 2ndly, some act, whether in word or deed, whereby that will is communicated to the other party. No man has entered into an agreement or contract to do, or not to do, some particular thing unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect; when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted. Now this is not a mere theoretical disquisition, but a statement of sound practical principles of universal law, and of the law of England in particular.

It will not (I suppose) be disputed that no power on earth, not even the power of the legislature, can coerce a man's will; that is, can compel him to be willing, if he be unwilling. You may indeed compel him to do a given act against his will, but you cannot compel him to be willing to do it. Or you may *persuade* his will by holding out motives which may induce him to change his will, and so become willing, though he was before unwilling; but as long as he remains unwilling, you cannot force him to be willing.

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To apply, then, the principles to which I have before referred to the case now before the Court. The company having been invested by the legislature with a power to take to themselves the lands of others, serve upon the landowner a notice to treat, by which they notify to him that they require to take certain of his land which they specify, and call upon him to state what his interest is, and what he claims as compensation for it. Now so far as the company are concerned they have the will, and they have notified that will to the landowner. Let it then be conceded (I do not assert it), but let it be conceded that the notice constitutes an agreement or contract on the part of the company. But how does it operate with respect to the landowner? Has he contracted or agreed? In the first place, what is his will on the subject? No one can say what it is, for no one can read his thoughts; he may be willing, or he may be entirely unwilling, but until he has by some means indicated his will, he must stand in the category of the unwilling. But in the next place, supposing that you could ascertain that he was willing, how has he communicated his will to the company? He has not opened his lips, or written a word or stirred a finger in relation to the matter. As the case stands, there is a total absence of both the requisites which are necessary to constitute an agreement or contract on his part. How then can it be predicated of him that he has entered into a contract to sell his land to the company? I know that whether willing or unwilling, and however unwilling he may be, he will be obliged to give up his land to the company. It may be said then, and said with reason, that he is compellable, when certain steps directed by the act shall have been taken, to sell his land to the company; but it would be against reason, and against law too, to

say that he has *contracted* to do so. If it be suggested that there is an implied contract on his part, I answer, that I can understand implying a contract against a man from some word, or deed, or conduct of his own; but I never yet heard of raising such an implication against a man from some act, not of his own, but of another person who is not his agent, and with whom he has no sort of connection.

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It appears to me, therefore, that, having regard to the essential nature and properties of a contract, it is impossible to hold that the mere service by the company of the notice to treat constitutes a contract on the part of the landowner to sell his land. It is beyond the power of this or of any other Court to make it such a contract. As Baron *Powell* pointedly observed in *Lord Montague v. Lord Bath* (a), "A Court of Equity may do great things, but it cannot alter things, or make them operate contrary to their essential natures and properties." To that observation of the learned Baron I would venture to add this, that it is beyond the power even of the legislature, with its so-called omnipotence, to make the service of the notice to treat a contract by the landowner. It may indeed enact that the notice shall be attended by the same consequences, or some of the same consequences, which flow from a contract, but it cannot make a thing that which it is not.

But further, when I examine the provisions of the Lands Clauses Consolidation Act, or any special act containing similar provisions, I do not find anything to countenance the theory that the notice to treat served

(a) 3 Cases in Chanc. 67.



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by the company constitutes a contract by the landowner to sell his land. The intention of the legislature was not to create equitable rights or interests, but to give legal rights and impose legal obligations; such rights and obligations to be asserted and enforced by legal proceedings prescribed by the act. It was not the intention of the legislature that the notice to treat should constitute a mutual contract to be dealt with by the Courts of Law and Equity as a contract. The notice to treat was intended to fix the particular lands which the company required, and to bring the parties together in order that they might, if they could, come to an agreement as to terms; and if not, then that the value of the lands should be settled by arbitration or by a jury; and until one or other of those proceedings took place, the property in the land was not intended to pass to the company either at law or in equity. In *Adams v. London and Blackwall Railway Company* (which I shall have occasion to refer to more fully hereafter), Lord *Cottenham* thus expressed his opinion on the purview of the act:—"The act does not consider the notice as constituting a contract, but as a preliminary step bringing the parties together who are afterwards to settle the matter between them by agreement, arbitration, or verdict of a jury" (a).

For these reasons it appears to me, regarding the question with reference to principle, that the service by the company on the landowner of the notice to treat, nothing more being said or done, does not constitute a contract by the landowner to sell his land.

But it will be said, "Are there no dicta of several Judges to be found in the books to the effect that the notice to treat does constitute a contract?" Now, if

(a) 2 M. & G. 132.

upon an examination of the cases (and I am now about to examine them) I find such dicta, I should first consider whether they referred to the effect of the notice with respect to the company or with respect to the landowner; for if they referred only to its effect with respect to the company, then they would not apply to the question now before the Court; which is, whether the service of the notice to treat constitutes a contract *on the part of the landowner* to sell his land; if on the other hand they referred to its effect with respect to the landowner, I should consider whether anything more was intended by those dicta than this, that some of the same consequences which flow from an actual contract also follow upon the service of the notice to treat.

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Upon a careful consideration of all the cases, it is apparent to any mind that, so far as the opinion may have been entertained that the mere service of the notice to treat constitutes a contract on the part of the landowner, it arose from its having been supposed that Lord *Cottenham* had on several occasions so decided. How far that supposition was well founded will appear from the cases themselves; and it will be found that in a case that came before Lord *Cottenham*, only a few weeks before he finally resigned the Great Seal (*Adams v. London and Blackwall Railway Company*), he explained what he intended to decide in the prior cases; and expressed himself in such a manner as to negative entirely the supposition that he was of opinion that the notice to treat constituted a contract on the part of the landowner to sell his land.

In *Salmon v. Randall* (a), which came before Lord *Cottenham* in July, 1838, a bill had been filed by a land-

(a) 3 My. & Cr. 439.

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owner to restrain the commissioners for improving *Cambridge*, who had given him the usual notice, from proceeding to summon a jury, on the ground that it did not appear that they had sufficient money to pay for the property. The Vice-Chancellor had granted the injunction, but Lord *Cottenham* dissolved it, and incidentally remarked (a), "They (the commissioners) have given a notice; the act of parliament is imperative that the jury shall assess the value, and the commissioners must tender the value so assessed. The owner is to hold until the value has been assessed by the jury and the tender made; *then upon the tender certain acts are to be done which will vest the premises in the commissioners, but till then the property remains in the owner untouched.*" And again, "*The parties I conceive are put into the situation of vendor and purchaser by the notice, and like every other vendor and purchaser they must, of course, complete their purchase according to the provisions, not of the contract, but of those arrangements which the act of parliament has substituted in lieu of the contract, in a case where no contract can take place.*" Those last words cannot mean that it was impossible that a contract should be entered into, but they must mean that by the mere service of the notice no contract had taken place.

The next case was *Stone v. The Commercial Railway Company* (b), also before Lord *Cottenham*. In that case the company had given to the Plaintiff the usual notice to treat, and he gave a counter notice stating his interest and what he was willing to take. The company summoned a jury and attempted to obtain a verdict respecting a piece of land, not the same in respect of boundaries as that specified in their notice. The

(a) Page 449.

(b) 4 My. & Cr. 122.

Plaintiff applied for an injunction, which was granted; and in the course of his judgment Lord *Cottenham* observed, "That notice and counter-notice having been given, the *parties are in a condition to come to an agreement*. If they can agree, either as to the whole or as to part, then so far as that agreement extends the question is settled. The act uses the words "the lands in question." *If the parties agree the lands become the lands of the company*, but if they do not agree then they are still "lands in question," and the act provides means by which the value is to be ascertained as to the lands in question. The lands in question, as to which the value is to be ascertained, are the lands mentioned in the notice. *The moment the company have given the notice the relative situation of vendors and purchasers is constituted between the parties*, and the value of the property (if the parties cannot agree) is to be ascertained by reference to a jury."


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It will be observed that in both of those cases Lord *Cottenham* states, that by the notice to treat, the parties were put into the relative position of vendor and purchaser. What he meant by that expression he himself clearly explains in the subsequent case of *Adams v. London and Blackwall Railway Company* (a).

The next case, *Walker v. Eastern Counties Railway Company* (b), is the only case in which it has been decided that the notice to treat constitutes a contract even on the part of the company, for the specific performance of which a bill can be sustained by the landowner. The decision was certainly not approved by Lord *Cottenham*, but even if it were sound, it would be very far from establishing the proposition, that such notice con-

(a) 2 M. & G. 132,

(b) 6 Ha. 595.

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stitutes a contract on the part of the landowner. In that case notice was given by the company and a counter-notice by the Plaintiff (the landowner), stating his claim. The company agreed with a tenant and took possession, and the landowner thereupon filed his bill for specific performance to restrain the company from pulling down the houses. The Vice-Chancellor *Wigram* said (a), "the cases cited for the Plaintiff clearly establish that the notice served by the company upon the Plaintiff had the effect of making a contract between them for the purchase by the Defendants of the Plaintiff's houses. It is clear that the company could not, after that notice, have retired from it;" and the Vice-Chancellor decreed that the Defendants should issue their warrant to summon a jury in three weeks, and reserved further directions and costs. From this decision an appeal was presented, but the case was compromised. I may observe, that the only case there cited for the Plaintiff which could be considered as countenancing the proposition that the notice to treat constitutes a contract was *Stone v. Commercial Railway Company* (b).

The next case is *Stamps v. Birmingham, Wolverhampton and Stour Valley Railway Company* (c), before Lord *Cottenham*. In this case the company intending to make a tunnel under the Plaintiff's house, gave him notice of taking such part of his land as was necessary for the tunnel; and they entered under the 85th section of the Lands Clauses Consolidation Act. In making the tunnel they damaged the Plaintiff's house, and the Plaintiff thereupon filed his bill and obtained an injunction. The company then gave notice to the Plaintiff of taking

(a) Page 600.

(b) 4 My. & Cr. 122.

(c) 17 Law J. N. S. (Chan.)

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the whole of his premises. The Vice-Chancellor *Wigram* refused to dissolve the injunction. On appeal the Lord Chancellor dissolved the injunction, holding that the first notice did not preclude the company from giving the second more extended notice. In giving judgment the Lord Chancellor said, "Now I have decided, and decided generally in all the cases where the question has arisen, that where a company gives notice to purchase, and where they have described the quantity of land that they require, by that means *they enter into a contract with the landowner* to make the purchase and that therefore they cannot afterwards depart from it."

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In the next case of *Burkingshaw v. The Birmingham and Oxford Junction Railway Company* (a), the company gave the Plaintiff notice; and the Plaintiff thereupon sent in a claim for 4,500*l.* and required the company to summon a jury. The company did nothing, and the Court held that the Plaintiff could not maintain his action to recover his claim for 4,500*l.* under the 68th section of the act. In giving judgment, *Pollock*, C. B., said, "It has been determined on several occasions by Lord *Cottenham*" (the only cases before Lord *Cottenham* which were cited in this case were *Salmon v. Randall* and *Stamps v. The Birmingham, &c. Railway Company*) "and independently of his high authority, we entirely concur in that opinion, that where a company, as here, give notice to a party that they require his lands for their works, it amounts to an agreement by them for the purchase of these lands *assented to by the opposite party*, on the terms of making the compensation in the way appointed by the act, under which such notice is given, and binds both parties finally." Here the opinion

(a) 5 Exch. 475.

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is expressed, that the notice constitutes a contract on the part of the company to take the land, but not that it constitutes a contract on the part of a landowner who had taken no step in the matter. The assent spoken of must refer to the assent indicated by making the claim and bringing the action.

Very shortly after the decision of that case came the case of *Adams v. The London and Blackwall Railway Company* (a), first before Vice-Chancellor *Wigram*, and on appeal before Lord *Cottenham*. In that case notice was given by the company on the 19th of July, 1847; and on the 9th of August the landowner (the Plaintiff) sent in his claim. On the 8th of November the company served a second notice, which included the lands comprised in the first notice, and also some further land, and on the 30th of November, 1847, the Plaintiff sent in his claim under the second notice. In February, 1848, the company came to an agreement with the Plaintiff as to the amount of compensation, but both parties afterwards repudiated this agreement. The company subsequently took possession under the 85th section of the Lands Clauses Act, and the Plaintiffs thereupon filed their bill against the company insisting that by the service of the notice of the 8th of November, 1847, a good and binding contract to purchase the Plaintiff's interest was constituted; and the bill prayed specific performance, and that the company might be decreed to take all proper proceedings for ascertaining the amount of compensation according to the act. To this bill the company demurred, but Vice-Chancellor *Wigram* overruled the demurrer (following his own decision in *Walker v. The Eastern Counties Railway*

(a) 2 Mac. & Gor. 118.

Company). On appeal Lord *Cottenham* abstained from expressing any direct opinion as to the decision in *Walker v. The Eastern Counties Railway Company*, and allowed the demurrer on the ground that as the company had taken possession under the 85th section of the act, the Plaintiffs had under the 68th section the power in their own hands of compelling the company to pay the compensation. But it is clear that he did not concur in the propriety of the decision in *Walker v. The Eastern Counties Railway Company*. In the course of his judgment the Lord Chancellor said (a),—“The Vice-Chancellor seems to have considered that, notwithstanding the provisions of the 68th section and the taking possession under the 85th section, the relative position of the parties in the present case was to be considered as if nothing had taken place beyond the notice of the 8th November, 1847, and *that such notice having constituted the relation of vendor and purchaser*, this Court could enforce the performance of all the incidents to that relationship. It is, I think, quite true that *to a certain extent and for certain purposes* the compulsory taking of land under the railway acts places the companies and the owners in the relative situation of purchasers and vendors, such for instance as to fixing between them the land to be taken. This was all that was decided in *Stone v. Commercial Railway Company* (b); *but it by no means follows that this Court will therefore take upon itself the specific performance of such sales*. If indeed the proceedings lead to an agreement, the Court might do so; for then, although originating in the compulsory power, the purchase would be to be effected under a private agreement, and so other cases may arise, but whether it would do so if the case de-

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(a) Page 129.
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(b) 4 My. & Cr. 122,
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pended entirely upon the notice of taking the lands, not followed by any agreement, or indeed by any claim on the part of the owner (for such is the present case as stated by the bill), the amount of purchase-money therefore not being ascertained, is a question upon which I do not think it necessary to express any opinion, because I think that the circumstances of this case call for a decision founded upon very different principles." And further on he says: "*the act does not consider the notice as constituting a contract, but as a preliminary step bringing the parties together, who are afterwards to settle the matter between them by agreement, arbitration or the verdict of the jury.*" And again, "*It cannot be that the notice per se gives to this Court jurisdiction, for if this were so, the jurisdiction would arise as soon as the notice was given.*"

We have here therefore Lord Cottenham's own clear explanation of what he meant by the expressions which he had used in the prior cases, and he very distinctly states his opinion, that though to a certain extent and for certain purposes the notice places the parties in the relation of vendor and purchaser, and involves some of the consequences which would flow from an actual contract, yet it does not amount to a contract which this Court will enforce upon a bill for specific performance, even when filed by the landowner against the company, still less that it constitutes a contract by the landowner to sell his land.


The next case which occurred was *The Queen v. The Birmingham and Oxford Junction Railway Company* (a). In that case the company gave notice and the landowner sent in his claim and demanded to have

the amount ascertained by a jury. After this, the three years limited by the 123rd section of the act for exercising the powers for the compulsory purchase of land having elapsed, the landowner applied for a mandamus to compel the company to summon a jury; and a mandamus was awarded by the Court of Queen's Bench. On writ of error that judgment was affirmed. *Parke, B.*, in giving judgment, said, "the notice by the company amounts to an *inchoate contract* by them to pay the price. Having done so they are bound to pay it, and to take the proper steps."

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The next case was *The Marquis of Salisbury v. The Great Northern Railway Company (a)*, in the Queen's Bench, on a case sent from Chancery. In that case the company gave notice to the Plaintiff, who offered to accept 600*l.* as the price of his land, which the company refused to pay. The company then had the land valued under the 85th section, and paid the amount of the valuation into the bank, and delivered to the Plaintiff their bond, but they did not actually take possession; and the Court held that after the expiration of three years they were entitled to take possession. In the course of his judgment Lord *Campbell* expressed himself thus: "*Strictly speaking there is no purchase and no contract created by the notice under section 18, but the company and the landowner are placed by the notice in the same position as if a contract of purchase had actually been entered into by them.*" In *Regina v. Birmingham and Oxford Junction Railway Company*, the judgment in which case was confirmed in the Exchequer Chamber, we held that the notice places the company and the landowner in the

(a) 17 Q. B. 853.

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position of purchaser and vendor, and that the contract thereby created may be considered as mutual, it being in the landowner's power to compel the company, after the expiration of the period prescribed for exercising their compulsory powers, to complete their purchase. It is possible that there may be no reciprocity in the transaction, that the landowner may be free and the company bound; but we should not, except with the greatest caution, arrive at such a conclusion. It seems to me, on the contrary, that the intention of the legislature was that the contract of purchase should be complete as soon as the notice had been given by the company. The great majority of the decisions is in favor of this view." And *Patteson*, J., in the course of his judgment, said, "I do not at all dissent from the decisions in which it is laid down that the mere notice by the company is of itself sufficient to create a contract of purchase between them and the landowner" (a).

The observation of Lord *Campbell*, that the notice places the company and the landowner in the same position as if a contract had actually been entered into, must mean that it does so to some extent and for some purposes; if it means more, it is in direct contradiction to the opinion of Lord *Cottenham*, and the observation of Mr. J. *Patteson* must be received in the same sense.

The next case was *The Edinburgh and Perth Railway Company v. Leven* (b). By the Scotch Lands Clauses Consolidation Act, 8 & 9 Vict. c. 19, s. 36, if, after notice to treat, the landowner serves a notice on

(a) Page 856.

(b) 1 Macq. H. of L. C. 284.

the company, stating the nature of his interest and the amount of compensation he claims, then the company shall within twenty-one days present a petition to the sheriff to summon a jury, and in default the company shall be liable to pay to the landowner the amount so claimed by him, which he may recover by action. And by section 37, before presenting the petition to the sheriff the company shall give ten days' notice to the landowner, stating their intention to have a jury summoned, and stating what compensation they are willing to pay.

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The company in that case omitted to give the ten days' notice, and applied per saltum to the sheriff, who refused their application. The Plaintiff brought his action to recover the amount he had claimed, and the Court of Session decided in his favor; and on appeal the House of Lords affirmed that decision. Lord Chancellor *St. Leonards* said, "The notice, *followed up by what took place*, made it as perfect a contract as could exist."

In *Sparrow v. The Oxford, Worcester and Wolverhampton Railway Company* (a), the question was whether the company, having given notice to take certain lands, part of Plaintiff's manufactory, and being called upon to take the whole, could abandon that notice and proceed by tunnelling. The Plaintiff filed his bill to restrain them. In giving judgment Lord Justice Knight *Bruce* observed, "The notice (whether it amounts to an actual contract or to a declaration of intention forbidden by the law to be departed from, is of no importance) had the effect of a contract, and the

(a) 9 Hare, 436; 2 De G., M. & G., 94.

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effect of giving the Plaintiffs a right to say that the lands mentioned in the contract should not be taken, should not be used, unless upon the terms that if the Plaintiffs desired to sell the whole the Defendants should purchase the whole. From that notice the Defendants are not entitled to recede."

The next case was *Morgan v. Milman (a)*, before Vice-Chancellor *Turner*. In that case lands were settled to such uses as *A.* and the Plaintiff his son should appoint, and in default to *A.* for life, then to Plaintiff for life, then to Plaintiff's first and other sons in tail, with remainder over; and the settlement contained a power to the trustees, with the consent of the person entitled to the first estate of freehold, to agree with any railway company as to amount of compensation for any lands the company might take. The *South Wales Railway Company* gave notice, and after negotiations about the price an agreement was signed by *A.*'s solicitor and the company's secretary that 8,000*l.* should be deposited by the company in a bank in the names of *M.* and *N.*, as security for the amount; and that thereupon the company should take possession, which was accordingly done. The company then gave a further notice to take more land, and by agreement a sum of 7,500*l.* was paid to *A.* on receipt of himself and Plaintiff on account of this land. *A.* died, and the Plaintiff, who was his executor, filed this bill against the company and the remainderman, insisting that the power of appointment ought to have been held to have been agreed to be executed, and the defective execution ought to be made good.

Both the Vice-Chancellor and the Court of Appeal

(a) 10 Hare, 279; 3 De G., M. & G. 24.


held that there was no contract for the execution of the power, and Lord Justice *Knight Bruce* said, "It is essential to the success of the Plaintiff on this appeal to show that a binding and enforceable contract, a contract at least in equity binding and in equity enforceable, was made between himself and his deceased father on one side, and the railway company on the other; whether necessarily a written agreement I decline saying, for the evidence is very far from satisfying me that there was any contract except indeed a contract formed only by the railway acts, an exception which substantially for every present purpose is no exception at all."

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Then came the case of *Inge v. The Birmingham, Oxford and Wolverhampton Railway Company* (a). The Plaintiff in this case was seised in fee of certain land and buildings, and the railway company having served him with notice, he sent in a claim for 1,500*l*. The company took possession, and the Plaintiff served them with notice to summon a jury to assess the amount of compensation; but the company not having summoned a jury, the Plaintiff brought an action to recover the 1,500*l*. The company's solicitor wrote to the Plaintiff's solicitor that the company would pay the 1,500*l*. claimed. The Vice-Chancellor decreed specific performance of that agreement; and with respect to the effect of the mere notice, he said, "The effect of the notice to treat is to create the relation of vendor and purchaser as between the company and the Plaintiff. *That upon that relation so constituted simply there would be a right on the part of an individual served with the notice to treat to file a bill for specific performance is a proposition which I think is not to be*

(a) 1 Sm. & Giff. 347; 3 De G., M. & G. 658.

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maintained; but there may follow on the service of the notice to treat such a course of conduct on the part of the company as shall amount to an agreement, and put it out of the power of the company to insist that the Court has not jurisdiction to decree specific performance, or to insist that the party served with the notice to treat, whose land the company have taken, can only recover his money by one of the modes pointed out in the Land Clauses Consolidation Act." On appeal, Lord *Cranworth* affirmed the decree on the ground that the letter of the company's solicitor constituted a special agreement to purchase the Plaintiff's interest for 1,500*l*.


These are (so far as I know) all the cases bearing directly on this question, and the inferences I draw from them are these. I consider that the notice to treat constitutes, as between the landowner and the company, the relation of vendor and purchaser to a certain extent and for certain purposes (that is the language of Lord *Cottenham* in *Adams v. The London and Blackwall Railway Company*), and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up, the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned Judges, which seem to intimate that it is a contract; but that in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner;


but at the same time it is perfectly true that if the company and the landowner do after the notice come to an actual agreement for the purchase and sale of the land, that is a contract which the Courts of Law and Equity will deal with just like any other contract for the sale and purchase of land between two individuals, notwithstanding its having originated in the exercise of the compulsory powers given by the act. And I think that the decision in *Walker v. Eastern Counties Railway Company* cannot be maintained.

I am therefore of opinion that neither upon principle nor upon authority can the proposition be maintained that the mere service by the company on the landowner of the notice to treat constitutes a contract by the landowner to sell his land to the company. And if there be no contract to sell, there is no conversion.

But supposing that the view of the case which I have thus far taken could not be supported, and that the notice to treat does constitute a contract, there still remains another view, which appears to me perfectly conclusive against conversion. The only reason why a contract by the owner of land for the sale of it to another operates to effect conversion is, that a Court of Equity will compel him specifically to perform his contract.

A Court of Equity considers that as done which ought to be done, and which it will compel to be done. There is no conversion at law. And why? Not because a Court of Law disregards the obligation of the contract, for it gives damages for the breach; but simply because a Court of Law does not enforce specific performance. Conversion as arising from a con-

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tract to sell is merely and exclusively the consequence of the application by a Court of Equity of the doctrine of specific performance. Where there can be no specific performance there can be no conversion. If the owner of land has contracted to sell his land to another, and the case is such that for any reason whatever, a Court of Equity would, if a bill were filed, refuse to decree specific performance, in that case there is no conversion. Lord *St. Leonards*, in his *Vendors & Purchasers* (a), after observing that a contract by a man to sell his estate revoked the devise of it in equity, says, "If an agreement be such as a Court of Equity will not carry into execution, it is clear that the property will by the new law (i.e. the Wills Act) pass to the devisee, whatever might have been the true rule before."

Now I hold that even if we are to assume that the notice to treat constitutes a contract, and a contract by the landowner to sell his land to the company, a Court of Equity will not decree specific performance of such a contract, even on a bill by the landowner against the company.

I had occasion to consider this question in *Hill v. The Great Northern Railway Company* (b), and decided that a bill for specific performance could not be maintained even by the landowner against the company. *A fortiori* a bill for specific performance could not be maintained by the company against the landowner where there has been nothing but a mere notice to treat. I should therefore have contented myself on the present occasion with merely referring to that case, and

(a) Page 160 (13th edit.)

(b) 1 Jur. N. S. 102.

expressing my adherence to the view I then took, but that a passage has been cited from the last edition of Lord *St. Leonards'* work on *Vendors & Purchasers*, in which his Lordship, referring to that case, states that the law is now otherwise settled (a). The passage is this:—"The notice forms a binding contract, and creates the relation of vendor and purchaser, and the landowner may file a bill for specific performance, and it is no objection that the price and the compensation form one sum. The notice is a kind of inchoate or quasi purchase, and it places the landowner in the same position as if there had been a contract to purchase his land; he is placed in the position of a vendor, and he may compel the company to complete after the expiration of the prescribed period; and he is bound equally with the company, who may enter after the expiration of the term limited for compulsory purchase, for the power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase. The right, however, to a specific performance was lately denied by Vice-Chancellor *Kinderley*, although it was not necessary to decide the point, and a specific performance was refused in a late case by the Master of the Rolls. But it is now a settled point that a sale to a railway company of land for a proposed railway may be enforced in equity, like any other contract for sale of land."

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Now as the propositions stated by Lord *St. Leonards* depend on the cases referred to as supporting them, it will not, I think, be inconsistent with the deference I unfeignedly entertain for that learned Lord if I examine the cases upon which the propositions are based.

(a) *Vend. & Purch.* p. 62 (13th edit.)

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With respect to the first proposition, that the notice forms a binding contract, and creates the relation of vendor and purchaser, it is true that it forms a binding contract so far as respects the company, and it is also true that, *to a certain extent and for certain purposes*, it creates the relation of vendor and purchaser, and this is probably all that Lord *St. Leonards* meant to say. But it is rather remarkable that the cases cited for this proposition do not bear it out. In the first of them, which is *Doo v. London and Croydon Railway Company (a)*, there was no notice to treat given by the company at all. In that case Plaintiff was lessee of a wharf and premises under the *Croydon Canal Company* for an unexpired term of nineteen years, determinable on his receiving from the company six months' notice and two years' reserved rent. A bill was pending in parliament in May, 1835, for power to make the railway. The Plaintiff and several other persons, also lessees under the canal company, gave notice that they would unite with the canal company in opposing the bill, in consequence of which, on the 13th of May, 1835, an agreement in writing was made between the promoters of the bill of the first part, the canal company of the second part, Plaintiff and several others of the lessees under the canal company of the third part, and Plaintiff and several other persons being owners of barges on the canal of the fourth part, by which the promoters agreed that, if any of the lessees should be applied to by the railway company to treat for and sell any part of their premises, or without being so applied to, if any of the lessees should by notice in writing given to the railway company signify his desire to sell the whole of his premises, then he should be entitled to have and receive

(a) 1 Railw. Cases, 257.


such compensation as should be agreed upon between him and the railway company ; and that in case they could not agree within twenty-one days after such notice, then the amount of the compensation should be ascertained by a jury in the same manner as any other compensation provided for by the act, or by arbitration, if required by the railway company.

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In consequence of this agreement all opposition to the bill was withdrawn, and the act was passed for making the railway, by which act the railway company was empowered to purchase the property of the canal company, which the railway company accordingly did.

On the 21st of August, 1837, Plaintiff gave written notices to the railway company that he was desirous of selling the whole of his premises, and claiming for purchase-money and compensation sums amounting together to 6,629*l*.

The railway company, on 25th September, 1837, sent a notice to the Plaintiff to determine his lease at the expiration of six months, and offering to pay him two years' improved rent, according to the provisions of his lease. The Plaintiff thereupon filed his bill for an injunction, which was granted in default of an answer. On a motion by the company to dissolve the injunction, it was dissolved by the Vice-Chancellor, but his order was reversed by the Lord Chancellor. In giving judgment on appeal the Lord Chancellor observed, that the moment *the Plaintiff's notice* was given the *relative situations of vendor and purchaser commenced*, and that the railway company having contracted to purchase the lessee's interest had no right to determine what they had so agreed to purchase. That case, therefore,

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was decided not on a notice to treat (for there was none), but on a special agreement.

The other two cases which are cited in support of this first proposition are *Reg. v. The Birmingham, &c. Railway Company*, and *Morgan v. Milman*, to which I have before referred; but neither of these three cases establishes the proposition that the notice to treat forms a binding contract, at least, on the part of the landowner, or creates the relation of vendor and purchaser for all purposes.

As to the proposition that the landowner may file a bill for specific performance, Lord *St. Leonards* cites *Walker v. The Eastern Counties Railway Company* (which no doubt supports that proposition), but his Lordship adds, in the note, "See *Adams v. London and Blackwall Railway Company* (a); *Hyde v. Edwards* (b); *South Eastern Railway Company v. Knott* (c); *Inge v. Birmingham, &c. Railway Company* (d). See *Munroe v. Newry &c. Railway Company* (e)."

Now with respect to *Adams v. London and Blackwall Railway Company*, all the observations of Lord *Cottenham* in that case (to which I have before referred) are opposed to the proposition that the landowner may file a bill for specific performance, where there has been nothing but a notice to treat. *Hyde v. Edwards* does not touch the question; nor does *The South Eastern Railway Company v. Knott*. In *Inge v. Birmingham, &c. Railway Company*, we have the clearly-expressed

(a) 2 M. & G. 118.

(b) 12 Beav. 160.

(c) 10 Hare, 122.

(d) 1 Sm. & Giff. 347; 3

De G., M. & G. 658.

(e) 2 Ir. C. R. 260; 1

Kay & J. 34.

opinion of the Vice-Chancellor *Stuart* that the proposition cannot be maintained that an individual served with the notice to treat might file a bill for specific performance ; and there is nothing in Lord *Cranworth's* judgment on the appeal affording the slightest indication of his dissent from that opinion. In *Munroe v. Newry, &c. Railway Company*, there was a special agreement between the landowner and the company, by which the company agreed to give, and the landowner agreed to accept, 110*l.* in full for the purchase-money and compensation ; and the landowner having presented a petition to compel payment of the money, the Lord Chancellor of *Ireland* dismissed the petition, on the ground that a Court of Equity would not interfere unless the ends of justice required it, but without prejudice to an action at law by the petitioner. The case cited by Lord *St. Leonards* (a) is *Pinchin v. London and Blackwall Railway Company*, in which the Vice-Chancellor *Wood* made observations tending to the conclusion that *Walker v. Eastern Counties Railway Company* cannot be considered as a binding authority.

With respect to the last proposition of Lord *St. Leonards*, that it is now a settled point that a sale to a railway company of land for a proposed railway may be enforced in equity like any other contract for sale of land, the cases cited by his Lordship for that proposition are *Hawkes v. Eastern Counties Railway Company* (b) ; and *Nash v. Worcester Improvement Commissioners* (c). Now in *Hawkes v. Eastern Counties Railway Company*, the bill was filed for specific performance of a special agreement between the company and the landowner, by which the company agreed to

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(a) 1 Kay & J. 34.

5 Clark, 331.

(b) 1 De G., M. & G. 737 ;

(c) 1 Jur. N. S. 973.

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pay him a certain sum for his land. In fact, there was never any notice to treat given by the company at all.

In *Nash v. The Worcester Improvement Commissioners* (a) the commissioners gave notice to the Plaintiff, and he sent in a claim, by which he claimed 960*l*. The parties not agreeing, the question of amount was submitted to a jury, who awarded 750*l*. The commissioners never paid or invested any part of the money, but entered into possession, and pulled down part of the premises which were unoccupied. The landowner filed his bill for specific performance. The counsel for the commissioners did not resist the decree, and admitted the title and all the facts, but called the attention of the Court to a certain mortgage and deed of settlement of the 26th May, 1852, authorized and confirmed by a special act of parliament, which facts, as the counsel suggested, rendered it doubtful whether any decree would be of use. Specific performance was decreed. In that case, therefore, there was not merely a notice to treat, but the parties had had the price settled by a jury, and the commissioners had thereupon taken possession of the land. Having regard to these two cases being cited by Lord *St. Leonards* in support of the last proposition, it must, I think, be assumed that his Lordship only intended thereby to lay down that if there be an actual sale by the landowner to the company, whether arising out of a notice to treat or not, such sale may be enforced in equity like any other contract for sale of land.

But whatever may be thought with respect to the possibility of the landowner filing a bill against the

(a) 1 Jur. N. S. 973.

company for specific performance on a mere notice to treat, it must be remembered that the question which is alone material with respect to conversion is whether a bill will lie by the company against the landowner. What shall we say with respect to a bill for specific performance filed by the company against the landowner, when nothing whatever has taken place but the service of the notice to treat? What is the decree to be? If it is to be by analogy to the decree in *Walker v. Eastern Counties Railway Company*, it must be a decree directing the company to issue their warrant to summon a jury. So that the suit would present the strange spectacle of the company asking the Court for a decree against itself, and that decree to compel the company to do an act which they may do of their own free will whenever they please. Certainly such a decree as that was never yet made. I should have said that no one ever even heard of such a bill, were it not that such a bill was actually brought before me a short time since in the suit of *The Metropolitan Railway Company v. Barker*. In that case the Defendant demurred, and the company consented to dismiss their bill.

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I am clearly of opinion—1st, that the notice to treat served by the company does not constitute a contract by the landowner for the sale of his land; and 2ndly, that if it did, a bill for specific performance will not lie against the landowner in respect thereof, and that therefore there is no conversion.

But two passages have been cited from Lord *St. Leonards' Vendors & Purchasers*, as showing that the notice to treat causes conversion. One of those passages is in page 66, and is as follows:—"Where a person is competent to sell, and a binding contract, or
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what is tantamount to it, is made under an act giving a company power to take land, the landowner's interest is converted into personalty, and will go to his personal representative, notwithstanding a devise by him before the sale of the estate." And for this proposition three cases are cited in the note, viz. *Ex parte Hawkins* (a), *Galliers v. Allen* (b), and *Richards v. Attorney-General of Jamaica* (c).

Now *Ex parte Hawkins* did not rest on the notice to treat, but on a special contract; for the price had been fixed by the surveyors of the parties, and the landowner had sent an abstract of his title. In *Galliers v. Allen* the value had been assessed by a jury at 700*l.*, and the amount had been paid into the bank to the account of the landowners. And *Richards v. Attorney-General for Jamaica* was a case under the act for the abolition of slavery, where the slaveowner, anticipating the operation of the act, made his will bequeathing the expected compensation-money; and it was held that he could do so by a will not attested by three witnesses. So that the citation of these cases shows that Lord *St. Leonards* did not mean to lay down the proposition that a mere service of a notice to treat would effect conversion.

The other passage cited was from page 160, and is as follows:—"As to dispositions by *vendors*; under the old law, as we have seen, a contract by a man to sell his estate revoked his will in equity, although not at law, and the rule has been held not to be varied by the statute; and the same rule prevails, although the sale is under compulsion of a railway." And

(a) 13 Sim. 569.

(b) Ibid. 577, n.

(c) 6 Moo. P. C. 381.

for this the case of *In re Manchester, &c. Railway Company* (a) is cited in the note ; but in that case the conversion was effected, not by a mere notice to treat, but by an actual contract entered into by the land-owner for the sale of his land to the company. So that all that Lord *St. Leonards* meant was, that if a testator sold the land it would effect conversion, even though the contract for sale originated in the exercise of the compulsory powers of the act.

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The result I arrive at is, that there is no conversion in the case now before me. There must therefore be a declaration that the devisees under the will are entitled to the purchase-money.

(a) 19 Beav. 365.

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April 17.

*Settlement.
Covenant to
settle future
Property.*

BROOKS v. KEITH.

Where a covenant to settle after-acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession; and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation: *Held*, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it.

THE question in this case was as to what property was comprised in a covenant to settle after-acquired property contained in a marriage settlement.


The covenant in question, which was contained in the marriage settlement of Mr. *Charles Brooks* and *Eliza* his wife, dated the 5th of October, 1842, was as follows:—"It is hereby agreed, that the whole of the portion or fortune of the said *Eliza Snook*, and all her future property, either by gift, bequest, descent or otherwise, shall be settled in the manner hereinafter mentioned or referred to, (that is to say,) it is in pursuance and performance of the said agreement, and in consideration of the said intended marriage, expressed to be covenanted, agreed and declared by and between the parties hereto, and particularly the said *Charles Brooks* and the said *Eliza Snook* do hereby for themselves severally and respectively, and their several and respective heirs, executors or administrators, covenant with the said *G. E. Keith* and *H. J. Keith*, their executors and administrators, that in case the said intended marriage shall be solemnized and take effect within six calendar months from the date hereof, in case at any time or times hereafter during the joint lives of the said *Charles Brooks* and *Eliza Snook* any real or personal estate, being of the value or amount in any case of 50*l*.

or upwards, shall descend or devolve to or vest in the said *Eliza Snook*, or to any person or persons in trust for her, or to or in trust for the said *Charles Brooks* in her right, all such real or personal estate as aforesaid shall by him the said *Charles Brooks* and *Eliza Snook*, but at the expense of the said trust estate, as far as the said *Charles Brooks* shall become interested therein, be forthwith, or as soon as the case will admit, and upon the request of the said *G. E. Keith* and *H. J. Keith* or other the trustees or trustee for the time being of these presents, be conveyed, assigned and transferred by him the said *Charles Brooks*, his heirs, executors or administrators, and by her the said *Eliza Snook*, unto and to the use of the said *G. E. Keith* and *H. J. Keith* or other the trustees or trustee for the time being of these presents, their heirs, executors, administrators or assigns, upon the trusts herein declared." The settlement contained a power to Mrs. *Brooks* to appoint the property by will.

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Mrs. *Brooks*, at the time of her marriage, was under the will of her grandfather interested in certain freehold and leasehold property, which was limited to her mother *Mary Keith* for life, with remainder to such of the children of *Mary Keith* as should be living at her death. *Mary Keith* died subsequently to the date of the marriage of Mrs. *Brooks*, who thereupon became entitled in possession to a share of this property.

Mrs. *Brooks* was at the time of the marriage also interested in certain leasehold property which under a settlement stood limited in trust for *Mary Keith* for life, with remainder to Mrs. *Brooks* and three other children of *Mary Keith* for their lives, with benefit of survivorship, with remainder to the children of the four. The

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settlement under which this property stood limited contained a direction that the shares of daughters in the rents should be to their separate use, and also a proviso for forfeiting the share of any child who should "sell, assign or otherwise part with or dispose of the same."

Mrs. *Brooks*, after the marriage, became entitled to a residue given to her separate use by the will of her mother.

Mr. *Glasse* and Mr. *De Gex*, for Mrs. *Brooks*, contended that neither of the properties came within the covenant. The freehold property was vested at the date of the marriage, though liable to be divested. With regard to the leasehold property and residue, they were settled to her separate use, and could not be held to come within the terms of the covenant; and as to some of the leaseholds there was a proviso against alienation.

Mr. *W.W. Mackeson* for Mr. *Brooks*.

Mr. *Toller* and Mr. *Elderton* for the trustees of the settlement.

The following cases were cited :—*Riley v. Garnett* (a); *Wilton v. Colvin* (b); *Wilcox v. Smith* (c); *Ex parte Blake* (d).

THE VICE-CHANCELLOR.

The object of the clause in question is 'only to affect such property as, if there had been no such clause, the husband would have been entitled to; and therefore it


(a) 3 De G. & Sm. 629.

(b) 3 Drew. 617.

(c) 4 Drew. 40.

(d) 16 Beav. 463.

cannot apply to any property in which the wife had a separate estate, inasmuch as the husband would not have had an interest in it. The whole property is in the wife, and the husband does not take anything in remainder; and the wife is only to have power to dispose of it by will and not by deed; and the object is only to affect such property as the husband, and not the wife, might otherwise become interested in.

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At the time of the marriage, under the will of Mrs. *Brook's* grandfather certain freeholds were devised to his wife for her life (who was then dead), with remainder to his daughter Mrs. *Keith* for her life, and after her death then to such children as she should have living at her decease, as tenants in common. So that at the time of the marriage, the mother Mrs. *Keith* being alive and having two children then living, the only interest which Mrs. *Brooks* had was contingent on her surviving her mother. On the mother's death Mrs. *Brooks* became entitled to a vested interest in a moiety in fee simple; and it is clear that this does come within the express terms of this covenant, for it was real estate which during the joint lives of Mr. and Mrs. *Brooks* devolved to and vested in Mrs. *Brooks*.

The next property is under a deed dated 22nd February, 1822, by which Mrs. *Brooks'* father settled leaseholds upon trust to pay the rents to the mother Mrs. *Keith* for life, and after her death to pay the rents to and amongst her four children *nominatim*, one of whom was Mrs. *Brooks*, for their lives, with survivorship; and it was provided that if any of them, being daughters, should marry, her share should be for her separate use; so that at the time of the marriage she had a reversionary interest in one third; but as that

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share was to her separate use, it appears to me that that does not come within the covenant.

The remaining property is derived under the will of *Mary Keith*, the mother of *Mrs. Brooks*, whereby, after giving certain freeholds on trust for conversion, the testatrix gives the proceeds and the residue of her personal estate to *Mrs. Brooks* for her separate use; and by the same will leaseholds are given to the separate use of *Mrs. Brooks*. None of this property comes within the covenant.

In the indenture of 1822 is a clause which requires observation. That clause provides that the sons and daughters shall not sell, assign, or otherwise dispose of or mortgage their shares, and that if they do so their shares shall go amongst the others. If the Court in this suit were to direct an assignment, the question would arise whether such an assignment would come within the meaning of this clause, "sell, assign," &c. I should be inclined to think that it would not; and that by the clause was meant such an alienation as would deprive the parties of the property. It appears to me that I ought not to make *Mrs. Brooks* incur the risk of an assignment, and therefore I shall merely declare that the property under the grandfather's will does come within the covenant, but that the other properties are not affected by it.

1861.
May 27.

TURNER v. SPOONER.

Ancient Lights.

THIS was the hearing of the cause to make perpetual an injunction granted for restraining the interruption by the Defendants of the Plaintiff's ancient lights.

The Plaintiff was a tailor, carrying on business in *Birmingham*; his business premises abutted upon a small yard belonging to the Defendants, Messrs. *Spooner*, bankers, whose back parlor abutted upon and looked into the yard, and was overlooked by one of the Plaintiff's windows. The Plaintiff had in the wall of his house two apertures, one of which was but a few feet from the ground, and the other on a higher level. Both had been used with windows long enough to acquire the character of ancient lights, and they had been so used, fitted with windows, of which the framework was so heavy and large as to contract considerably the number of square feet accessible for the passage of light through the openings, and the glazing of the windows consisted of small panes of glass, with leaden framework, such as is used in cottages and small farmhouses. The windows originally opened outwards, and one of them could only be opened partially. Recently Mr. *Turner* had rebuilt or repaired his premises, and he retained in the new wall apertures of exactly the same size, and in exactly the same positions as the original apertures; but he put in new windows, opening inwards. The windows were what are called French windows, with small, or at least

The principle as to ancient lights is, that the owner of the dominant tenement cannot depart from the mode of user substantially. He cannot change the position of his lights, nor increase the original aperture into which windows have been put. But if he has, in using his right, contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows by windows of an improved structure that let in more light and air.

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moderate-sized frames, and large plates of good glass. And it was admitted that the new windows contracted the area of the old apertures much less than the former windows; that of course they admitted more light and air, and that they gave greater facility for any inmate of Mr. *Turner's* house to look out into, and to have access to, Messrs. *Spooner's* yard.

Previously to this alteration, and before Mr. *Turner* personally occupied his premises, his tenant had iron bars to the windows, and having removed them, had been required by Messrs. *Spooner* to put them up again, and he did so. It did not appear whether Mr. *Turner* had been consulted, or objected or acquiesced. After the alteration of the windows, Messrs. *Spooner* objected to it, and the Plaintiff insisting on his right, they put up in their own yard, and within a few inches of the windows, a large frame, adapted and intended to receive iron bars, and in the meantime provided with thick plates of glass; so that, whichever way the frame was used, it would have operated as a sort of screen, interrupting seriously the access of light, and to some extent the access of air to the Plaintiff's tenement, the entire distance between the walls of the two houses being very small, so that the maximum of light attainable was not large, and any diminution of it was of importance. These were the principal proved or admitted facts.

Mr. *Glasse* and Mr. *Springall Thompson* for the Plaintiff.

The defence will be really nothing more than this, that our ancient windows were clumsy and bad windows; casements with thick frames that intercepted light *pro tanto*; and that we have since put in good

modern windows, that do not intercept so much light. They say that by that alteration we have lost our right of ancient lights. This is wholly mistaking the principle. We admit that you are restricted, as the owner of ancient lights, to the right as it has been used; but that means not user *modo et formâ* to the minutest particular, but user as it has substantially been. You may not change the locality of your lights; you may not so use them as to increase the limits of the ancient abstraction from the right of enjoyment of the servient tenement. But you are not precluded from applying modern improvements, for the enjoyment of the light and air in a more beneficial manner to yourself. The right of preventing your neighbour from building without limit, and the right of looking out into your neighbour's premises, are no doubt injuries. But the injury is not increased by the fact of your letting in through the old aperture more light than you did before. Because we let the light flow in in a larger quantity, keeping still to the original aperture, we do not alter the nature of the easement. The easement is the old aperture in the wall, and the contention on the other side must be, that because our ancestors made clumsy windows, and so let in less light than would pass through the aperture, we are not at liberty to improve the structure of our windows. They cited *Cooper v. Hubbuck* (a); *Calkwell v. Russell* (b); *Hutchinson v. Copestake* (c).

Mr. Baily for the Defendants.

The principle is, not that you are entitled as owner of ancient lights to the entire opening in the wall. You are entitled to it as you have used it, and no further.


(a) 9 W. Rep. 352.

(b) 26 L. J. N. S. Ex. 34.

(c) 8 C. B. Rep. N. S. 102.

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Suppose the Plaintiff had blocked up the opening for twenty years with a fast shutter; could he now remove that, and use the opening as an ancient light? Clearly not. Are you then to say in what proportions he may enlarge the area for light? If so, what certain rule is there? The rule, and the only certain rule, is, that you must measure the right by the actual enjoyment, the user. The Plaintiff had an ancient light, contracted to given dimensions by the windows he used; that was his mode of user. He cannot go beyond that. It is not necessary that we should show actual damage, though we can show it. The right of ancient light is in itself an infraction of our right of fully enjoying our own freehold; that infraction is permitted by law, so far as user extends it, but the right of infraction cannot be increased; *Garritt v. Sharp* (a); *Blanchard v. Bridges* (b); *Renshaw v. Bean* (c).

With him Mr. Spooner and Mr. F. T. White.


Hitherto the easement was no nuisance; it has become so by the alterations. The mode in which the easement is dealt with gives increased powers of overlooking our premises, and increased facilities of ingress to them. The rule as to servitudes is, that they are *strictissimi juris*. The dominant tenant cannot impose any new burden on the servient tenant. The right is not by grant, but by presumed agreement. We have agreed to the user, strictly as it was; we have agreed to nothing more; *Luttrell's Case* (d).

As to the lower window, it was used coated with white paint; it had bars before it, and it could not

(a) 3 Ad. & El. 325.
 (b) 4 Ad. & El. 176.

(c) 18 Q. B. 113.
 (d) 4 Co. 86 a.

open more to than one-fourth of its extent. That is the user that we have submitted to, and no more.

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As to the upper window. In that window also there was a barred opening, through which no one could get from the Plaintiff's premises into our yard ; now any person can. That is an injury. The increased power of overlooking us is an injury to privacy, and privacy is a legal right; *Cherrington v. Abney* (a). They cited also *Gale on Easements* (b).

If we desire to build, as we have a right to do, we could not do so without raising a case for litigation as to whether we are, by interfering with the new user, infringing the ancient right. That is a litigation which the Plaintiff has no right to subject us to; *Ballard v. Dyson* (c); *Cowling v. Higginson* (d); *Allan v. Gomme* (e).

Mr. Glasse in reply.

The easement is founded on supposed covenant not to interrupt the free access of air and light through the ancient opening. Slight variations in the amount, arising out of style of building, are not to be taken into account. Whatever of light and air will come through the opening in the wall I have a right to admit. I might dispense with windows altogether if I chose; and the presumption in every case of ancient lights is, from the very fact of their being an ancient light, used from time immemorial, that originally there were no windows.

(a) 2 Vern. 646.

(b) Pages, 373, 374, 375.

(c) 1 Taunt. 279.

(d) 4 Mee. & W. 245.

(e) 11 Ad. & El. 759.

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As to the injury done by their obstruction, it is not pretended that it will do us no injury. We have calculated, and that is not contradicted, that it will intercept at least one-sixth of our light.

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The question here is, not so much what is the general principle, as what is the application of it. There is no doubt that the Plaintiff's windows are ancient lights; that is not disputed. The effect is, that the owner of the Plaintiff's tenement has acquired an easement; that is, that as against the owner of the opposite tenement, he has a right to say, "Although you might otherwise do what you like with your own property, yet your right is so far controlled by mine, that you cannot so use your property as materially to interfere with the access of light and air to mine." That is the general rule; the question is, its application to the circumstances of this case.

Now the Plaintiff's premises having recently been rebuilt, although the windows are retained in the same position, they have undergone alteration. First as to the window A upon the model (that is the upper window). Before the alteration it was fitted into the same aperture, or an aperture of equal magnitude, and in the same position with that which now exists; but the glazing formerly occupied a certain portion only of the aperture. It had down the centre a mullien which divided the glazed work, and the glazed work consisted of small panes of glass let into leaden frames; and the windows opened outwards, and was only capable of being opened to one-fourth of its area. That was the condition in 1860. Of course the effect was that less

light and air were admitted than if a different and better mode of framing and glazing were adopted. And that has now been done.

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Then as to window B (that is the lower window of a room formerly used by the Plaintiff as a pantry). The state of the case is not precisely the same, but there is no difference in the principle of the alteration. [His Honor referred to the fact proved that this window had always been used, coated with white paint.] The result is as to each of the two windows, that although the Plaintiff has not altered the position of the window, nor the size of the original aperture, still he has unquestionably let in more light and air. Therefore the question comes to this: if a party entitled to ancient lights, by adopting modern improvements in the structure and glazing of his windows, has increased the quantity of light let in, has the owner of the servient tenement a right to cut him down to exactly the same quantity of light and air that he had before? I think that such a proposition cannot be maintained. It appears to me that although ancient lights must not be altered, either as to the aperture in the building or as to their position, yet if the owner makes alterations merely in the framework and glazing of his windows, not altering their position or the size of the aperture in the building, he has a right to do so, without losing his privilege. That is not the acquisition of a new easement, although if he puts in additional windows, if he increases the number of apertures, or increases their size, that would be creating a new case, and the owner of the servient tenement would have a right to intercept the new lights.

It has been argued that with regard to the lower

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window (which was used for 'the pantry), because it was used painted inside with white paint, the right to the easement is limited to that precise species of user, that the presumed agreement is that it shall be used strictly *modo et formâ* as accustomed. It appears to me that that argument cannot prevail. This is a room formerly used as a pantry, and the painting inside must be presumed to have been used, not for the benefit of the owner of the Defendants' premises, but for that of the owner or occupier of the Plaintiff's premises, in order that persons outside in the Defendants' yard might not see into the Plaintiff's pantry. So as to the iron bars formerly put up inside the other window: the assumption must be, not that they were put up by the owner of the Plaintiff's premises to prevent access from his tenement to the Defendants' yard, but for the protection of the occupier of the Plaintiff's house; and I cannot come to the conclusion that the former use of iron bars by the Plaintiff entitles the Defendants to obstruct his ancient light.

His Honor then commented upon some minor points raised by the Defendants in argument, and concluded by making a decree for a perpetual injunction.

1861.
June 6.

*Appeal. Stay
of Proceedings.*

LORD v. COLVIN.

IN this case the Court had been called on to decide three questions: firstly, whether there had been a marriage in India between Dr. *Cochrane*, whose estate was being administered, and a native lady, in which case Mrs. *Moorhouse*, the daughter of that alleged marriage, would have been legitimate, and entitled to large interests in her father's estate; secondly, whether Dr. *Cochrane* died domiciled in *France* or in *Scotland*. If he died domiciled in *France*, then Mrs. *Moorhouse* would, by the law of *France*, be entitled, as it was contended, to one-ninth of his estate. Thirdly, whether the Plaintiff *Lord* was in right of his wife, in the event of Mrs. *Moorhouse* being illegitimate, entitled under a Scotch testamentary instrument made by Dr. *Cochrane* to a large sum of about 50,000*l.* arising from certain accumulations. The last was a question purely of Scotch law. The Vice-Chancellor had decided upon the evidence that there was no Indian marriage, and that Dr. *Cochrane* died a domiciled Scotchman. These two decisions wholly displaced the claim of Mrs. *Moorhouse* on the question of accumulations. His Honor had sent a case to the Scotch Court, and on that Court returning an opinion in favor of Mr. *Lord*, his Honor decreed according to that opinion, and made an order, part of which was for payment out to the Plaintiff *Lord* of the 50,000*l.* accumulations. From the decree on all these three points Mr. and Mrs. *Moorhouse* appealed, and they now moved for an order to stay execution of the decree pending the appeal, so far only as it ordered payment out to the Plaintiff *Lord*.

The Stay of Proceedings pending an appeal, is in the discretion of the Court.

Where the Court has no judicial doubt upon the decree, it will not in general stay proceedings. But where an order was made for payment of a large sum to *A.*, and it was in evidence that *A.* had heavily encumbered his interest; and part of the decree was made in conformity with the decision of a Scotch Court, on a case sent to it, as to which the Court could form no judicial opinion; Stay of Proceedings was ordered pending an appeal.

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Mr. *Glasse* and Mr. *Welford* for the motion.


The stay of proceedings pending an appeal is, we admit, not to be asked for as of course; but it is in the discretion of the Court, and the principle on which the Court acts is, that if it has reasonable judicial doubt of the correctness of the decree, and if there is obvious danger to the fund should the decree be reversed, the Court will stay the proceedings. Now here, upon the question at least of domicile, the judgment itself, and the extreme care with which the evidence is dissected and balanced, show that the Court felt considerable difficulty in arriving at a conclusion; and we submit that even upon the more vital question, the Indian marriage, it is not too much to say, that it is at least a fair question for argument. But if the Court entertained no doubt whatever on these points, at any rate upon the question of the right to the accumulations, that is a question of pure Scotch law, on which the Court has expressly declined to give or entertain any opinion. It is therefore impossible that the Court can say it has decided that point, without any doubt whatever.

Then as to the danger to the fund: that is patent. Without meaning to cast the slightest imputation upon the Plaintiff, it appears on the proceedings that he has heavily encumbered his interest, and that if this sum of 50,000*l.* is paid out to him, a large portion must go at once into the hands of his creditors; so that if the decree should be reversed, it is highly improbable that the Plaintiff will be in a position to bring back the fund.

Mr. *Anderson* and Mr. *E. F. Smith*, for the Plaintiff, opposed the motion.

The Court has no doubt a discretion, but a strong

case must be made, and the Court will not assume its own judgment to be wrong, or even doubtful. The objection that the Court has given no opinion upon the Scotch question, is a fallacy. It may be quite true that this Court has expressed no opinion, but that is not the question; the question is, whether this Court has any fair ground for doubting the soundness of the opinion arrived at by the Scotch Court. And if this Court cannot, because of its being a Scotch question, form any opinion, how can it be asked to treat the Scotch decision as doubtful, which would be forming an opinion.

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As to the decision upon domicil, it is quite immaterial whether the Court has any doubt on its mind or not. If the decision were quite wrong; if Dr. *Cochrane* died a Frenchman by domicil, the utmost that Mrs. *Moorhouse* could claim would be one-ninth, and there is much more than sufficient to cover that, remaining in Court.

Then as to the danger. That is an argument that might be used in every case. It must be assumed, when a man receives money that he may spend it, and in every case it would be an argument for staying the execution of a decree.

Mr. *Baily* and Mr. *Roxburgh* for certain parties; and Mr. *Morris* and Mr. *H. M. Jackson* for others, were also against the motion, but did not argue.

Counsel for the other parties in the cause took no part in the controversy.

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COLVIN.Mr. *Glasse* replied (a).

*Wright's Trusts* (b); *Mayor of Gloucester v. Wood* (c);  
*Walburn v. Ingilby* (d); *Swift v. Grazebrook* (e); *King*  
*of Spain v. Machado* (f); *Herring v. Cloberry* (g).

## The VICE-CHANCELLOR.

In applications of this kind, which must be made to the Judge who pronounced the decree, he is bound to consider the nature of the question decided and the grounds of his decision, and whether the case is one on which he might judicially entertain a reasonable doubt. There may be cases in which the Judge cannot feel any doubt: is that the case here? The first question which I had to decide in the cause was the validity of the alleged Indian marriage; the second, whether the domicile of Dr. *Cochrane* was French or Scotch; for if French, then, even assuming Mrs. *Moorhouse* to be illegitimate, she might have been entitled to a share of the testator's property. Unless the *Moorhouses* succeeded in one or other of those questions, they had no ground for claiming any interest. Now the matters decided by me were—first, that upon the evidence there was no Indian marriage, and therefore that Mrs. *Moorhouse* was illegitimate; secondly, that Dr. *Cochrane's* domicile was Scotch. If I was right in my

(a) An objection was also taken to the motion, that an agreement as to the conduct of the Scotch case had been entered into, which operated as a waiver by the *Moorhouses* of their right of appeal. This question turned altogether on the intention of the parties, and did not involve any matter of law or practice; and

the Court decided that the application of Mr. and Mrs. *Moorhouse* was not affected by it.

(b) 2 Ka. & J. 595.

(c) 3 Hare, 131; 1 Phill. 493.

(d) 1 Myl. & K. 61.

(e) 3 M. & Gor. 6.

(f) 1 Myl. & K. 85, n.

(g) 12 Sim. 410.

decision on both those points, then the *Moorhouses* have no interest. Even if I was wrong on the second point, it would not follow that Mrs. *Moorhouse* would have any interest; that would depend on a question of French law. As I understand, the appeal is on both these points, and also on another, the question who is entitled to the accumulations after the expiration of twenty-one years from the testator's death. That being a question of Scotch law, I sent a case for the opinion of the Scotch Judges, who have certified their opinion that Mr. *Lord* is entitled to the accumulations; and in accordance with that opinion, the money was ordered to be paid out to him. From that order there is also an appeal.

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Now as to the question of domicil, and as to the question whether, if the domicil was French, Mrs. *Moorhouse* would be entitled to a share by the French law, it appears to me that the circumstances do not afford a ground for this application. For if Mrs. *Moorhouse* should succeed on those points in establishing her claim, it is not suggested that she would be entitled to more than one-ninth share of the fund. Now the order for payment out of Court, which is the only part of the decree sought to be staid, is the payment only of the accumulations, about 50,000*l.*; and if that sum is paid out, there remains in Court amply sufficient to pay Mrs. *Moorhouse's* one-ninth share, assuming her to be entitled.

Upon the question of the Indian marriage I must say that I do not feel any doubt upon the evidence that was before me. Whether I ought or ought not to have given an opportunity for bringing in further evidence, is a point upon which perhaps there may be

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more ground for doubt. Still the circumstances appeared to me so strong, that I think I was right in refusing it; and if the case rested there, I should refuse the application to stay proceedings.

But then comes this question. Besides the two points already mentioned, there is an appeal from what is in fact a decision of the Scotch Court, on a question of Scotch law. Upon the propriety of that decision, I cannot form any judgment at all. The appeal from my order is really an appeal from the certificate of the Scotch Judges. And I am not able to form any opinion whether there is a reasonable ground for appeal.

Another point always to be considered is the amount of the money at stake, and the chance, if it should have been wrongfully paid out, of getting it back again. Now the amount here is very large, and though I do not mean for one moment to say that Mr. *Lord* is shown to be insolvent, still he is shown to have charged his interest very heavily; and for any man who had received a sum of 50,000*l.*, and thereout had to pay a great part to incumbrancers, it would be no easy matter to restore it; and I am bound to say that this large sum, if wrongfully paid out, would be in considerable peril.

Under these circumstances, I think I am bound to suspend the execution of the order, so far as it relates to paying out the money, except upon the terms of the Plaintiff *Lord* giving satisfactory security for its replacement.

The order was made in the same form as in "*The Mayor of Gloucester v. Wood.*"

1861.  
July 23 and 25.

19 & 20 Vict.  
c. 120, s. 17.

*Petition for  
Investment.  
Service.*

**Re DUKE OF CLEVELAND'S HARTE ESTATES.**

**THIS** was a petition presented by the trustees of the Duke of *Cleveland's Harte* estates, under the 24th section of the Settled Estates Act, and also under certain private acts authorizing the sale of parts of the *Harte* estates; and it asked for the investment in the purchase of other lands of the produce of certain sales which had taken place under these acts.

The words "every application" in the 17th section of the Settled Estates Act (19 & 20 Vict. c. 120) refer only to applications under the act for the sale of estates, and not to petitions dealing with purchase-money.

The only question which arose upon the petition was, whether it was necessary to serve all the persons referred to in the 17th section of the Settled Estates Act (a), who in the present case were very numerous.

Mr. *Renshaw*, for the Petitioners the trustees, contended that the case did not fall within the words "every application" in the 17th section, and pointed

(a) The 17th section of the 19 & 20 Vict. c. 120, is as follows:—"Subject to the exception contained in the next section, every application to the Court must be made with the concurrence or consent of the following parties; namely:—Where there is a tenant in tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant in tail; or if there be more than one such tenant in tail, then the first of such tenants in tail and all persons in exist-

ence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail. And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child."

1861.

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DUKE OF  
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HARTE  
ESTATES.

out the serious inconveniences which would arise if it were necessary to serve all the persons interested upon every application respecting the management or investment of purchase-monies paid in under the act. He referred also to the 19th and 20th sections of the act, where the same words occur.

Mr. *Bagshawe*, jun., appeared for the tenant for life, and Mr. *Rasch* for the infant remainderman.

Mr. *R. Hawkins* appeared for the purchasers, and Mr. *Osborne Morgan* for a mortgagee of the estates sold.

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July 25.

*The VICE-CHANCELLOR* said he had considered the question, and had endeavoured to ascertain whether there was any settled practice on the matter, but had not been able to find any sufficient indication of what the practice was. Upon looking through the act he thought that, although the language of the 17th section of the act, if taken literally, would include the present application, still it was impossible to suppose that the legislature could have intended that all the persons mentioned in that section should be served with every application for obtaining directions upon any matter relating to the purchase-money of the estates sold. The words "every application" must therefore be considered as restricted to the applications referred to in the foregoing sections of the act, namely, applications for the sale of property; and in the present case the service on the tenant for life and remainderman must be held sufficient. If the Court were to adopt a different construction the tenant for life could not obtain payment of the dividends without the concurrence of all the persons mentioned in that section.

HAYNES v. BARTON.

In the Matter of THE METROPOLITAN RAILWAY ACT, 1854, and

In the Matter of THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

1861.  
8 & 9 Vict.  
c. 18, s. 80.  
Costs.  
Railway  
Company.

THIS petition was presented praying that part of a sum of 850*l.*, which had been paid into Court by the *Metropolitan Railway Company* for the purchase of certain premises taken by them for the purposes of their railway, and which sum was standing to the credit of "*Ex parte The Metropolitan Railway Company*, in the Matter of the Metropolitan Railway Act, 1854," might be reinvested, and the only material question was, as to what costs ought to be paid by the company.

The suit of *Haynes v. Barton* was instituted for the administration of the estate of *Joseph Bayley Haynes*, who died in 1845, having by his will dated in March, 1844, devised certain premises situate at *Middlesex Place, New Road*, to his trustees *John Barton* and *Thomas Slater* upon certain trusts declared by his will.

On the 30th of July, 1858, the trustees (the present Petitioners) were served by the railway company with a notice that the premises at *Middlesex Place* were re-

by a railway company, and a petition was presented in the suit and also in the matter of the act for the reinvestment of the purchase-money which had been paid into Court, the company were ordered to pay the costs of the tenant for life and remaindermen in the land taken by them, who were parties to the suit and served with the petition; and they were also ordered to pay the costs of former proceedings in the suit which had been occasioned by the company's taking the land.

Where land is taken by a railway company under the compulsory powers of the Lands Clauses Consolidation Act, and the purchase-money is paid into Court, all the costs occasioned thereby must be paid by the railway company, although some of such costs may have been occasioned by the existence of a suit of which the land taken was the subject.

Therefore where land which formed the subject of a suit was taken



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v.  
BARTON.

quired for the purposes of their railway; and the trustees were required to state their claim in respect of such premises, which they did. The trustees valued the premises at 1,000*l.*, but the company refused to give more than 850*l.*; and the trustees, on the 9th of March, 1860, presented a petition in the suit praying that they might be at liberty to require the value of the premises to be assessed by a jury or by arbitration, pursuant to the provisions of the Lands Clauses Consolidation Act. Upon this petition coming on to be heard it was referred to Chambers.

While the inquiries directed were being prosecuted at Chambers, and before any contract had been entered into, the company entered and took possession of the premises, and proceeded to pull them down. This circumstance having been notified to the Judge in Chambers, he directed the trustees to cause a bill to be filed to restrain the company from further proceeding with the pulling down of the house or interfering with the premises; and a bill was accordingly prepared and expenses incurred in relation thereto. Before the bill however was filed, the company rendered further proceedings unnecessary, by paying the 850*l.* into Court.

The trustees had since, with the sanction of the Court, agreed to accept 850*l.* in full for the purchase of the premises; and they now presented the present petition praying that the 850*l.* might be paid to them to enable them to complete a purchase of other premises which they had agreed to purchase, and that the dividends might be paid to the tenant for life.

The petition prayed that the costs of the petition presented in March, 1860, the costs occasioned by the

wrongful taking possession of the premises by the company, and the costs of the purchase and of the present petition, might be paid by the railway company.

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 HAYNES  
 v.  
 BARTON.

The petition was served on the Plaintiffs in the causes, on the tenant for life of the premises under the will, and on the railway company.

Mr. *Baily* and Mr. *Morris*, for the Petitioners the trustees, submitted that they were entitled to their costs, which were all occasioned by the company's having taken the land, though perhaps some were also caused by the existence of the suit of which the property taken formed the subject. They asked for, first, the costs occasioned by the original petition of March, 1860; secondly, the costs occasioned by the taking possession by the railway company, and thirdly, the costs of and incident to the present petition; and submitted that all those costs, though perhaps they would not all have been incurred but for the existence of the suit, were nevertheless all occasioned by the company's taking the land, and therefore came within the 80th section of the Lands Clauses Consolidation Act (*a*), and were payable by the company.

Mr. *Glasse* for the Plaintiffs in the suit, who were remaindermen, and Mr. *Jessel* for the tenant for life, who was one of the Defendants who had been served with the petition, respectively asked for their costs of and incident to the present petition, with which they had been served and upon which they had properly appeared.

Mr. *Bovill*, for the railway company, submitted that the original petition was presented in the cause, and entirely behind the back of the company. It was a pro-

(*a*) 8 & 9 Vict. c. 18.

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ceeding which was occasioned by the existence of the suit. The expenses incurred in respect of taking possession of the premises were also incurred by reason of the suit, and therefore ought not to be thrown on the company. With regard to the costs of the Respondents, it was not necessary to serve them, and the company ought not to be obliged to pay their costs.

*Hore v. Smith (a)*; *Ex parte Staples (b)*; *Melling v. Bird (c)*; *Re Picton's Estate (d)*; *Duke of Cleveland Harte Estate (e)*, and the cases referred to in the judgment, were cited.

Mr. *Baily* in reply.

#### THE VICE-CHANCELLOR.

The question is, what costs must be paid by the railway company, who have taken certain lands for the purposes of their railway and paid the purchase-money into Court; the present petition being presented for the payment of such money out of Court.

The petition is presented not only in the matter of the act, but also in the cause. I have looked into the cases, and I find that though they are not precisely uniform, still there is a clear principle deducible from them.

The cases which seem to me to bear on the question are the following.

The first case which occurred was *Dinning v. Henderson (f)*, which came before Lord Justice *Knight Bruce*, when Vice-Chancellor. In that case a devisee

(a) 14 Jur. 55.

(b) 1 De G., M. & G. 294.

(c) 17 Jur. 155.

(d) 3 W. R. 327.

(e) Ante, pp. 46, 48, n.

(f) 2 De G. & Sm. 485.

in trust, who was the surviving Plaintiff in the cause, agreed to sell to the company a portion of the testator's estate under the Lands Clauses Consolidation Act. The purchase-money was paid into Court in the matter of the act; and the Plaintiff presented a petition in the cause and in the matter of the act to have it transferred to the credit of the cause, and praying that the company might pay to the Petitioner and the other parties in the cause their costs of and incident to and consequent on the application. The Vice-Chancellor *Knight Bruce* said the 80th section of the Lands Clauses Consolidation Act required a liberal interpretation to be put upon it in order to give the parties their costs; but he thought it was the sounder interpretation, and he directed the company to pay the costs as prayed. In that case, therefore, the Vice-Chancellor seemed to consider that upon the true construction of the act the company was bound to pay the costs of the parties in the suit, as well as the costs in relation to the matter of the act.

The next case came before Lord *Langdale* in 1848. In *Re Hull and Selby Railway Company* (a) a petition was presented by two of the parties to a suit, claiming to be interested in 1,880*l.* paid into Court in the matter of the act by the company as compensation for land taken by them, praying that the fund might be transferred to the credit of the suit and invested, and that the company might pay the costs, charges and expenses of all parties of and relating to the application. The parties were numerous, and some appeared by two different counsel. Lord *Langdale* said, "I have oftentimes had occasion to observe on the imperial powers conferred by the legislature on these companies, by which they are enabled to take away any man's land from him by force,

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whether he will or not, without giving him a voice in the matter. The laws then are bound to protect individuals whose rights are invaded for the public good, against these companies; and if persons are put to expense by having their land taken away from them by those extraordinary powers, it surely would be unreasonable that they should be obliged to bear that expense;" and an order was made according to the prayer.


The next case was the case of *Re Taylor, a Lunatic (a)*, before Lord *Cottenham*. In that case the committees of a lunatic contracted with the company, under the authority of the act, for sale of part of the lunatic's estate. The purchase-money was paid into Court in the matter of the act. The committees presented a petition to have the money invested, but the Lord Chancellor said it was necessary to have a reference to the Master to inquire whether the contract was proper and beneficial, having regard to the authority given by the act; and he ordered accordingly. The Master having reported in favor of the contract, the committees presented a petition to confirm the Master's report; that the Petitioners might be at liberty to convey, for payment of interest of the purchase-money, for investment, and that the costs of the Petitioners of and incidental to the conveyance and investigation, deduction and verification of title, and of obtaining and prosecuting the reference, and of the petition, and of the order to be made thereon, should be paid by the company; and the Lord Chancellor said it was quite clear that the company must pay the costs in question, the reference having been rendered necessary in consequence of the purchase. That case, therefore, is also a clear authority on the subject.

(a) 1 M. & G. 210.

The next case was *Picard v. Mitchell* (a), before the Master of the Rolls. The suit was an administration suit. The company served the usual notice to treat for some of the testator's land. An order was made on a petition in the suit for a reference to inquire whether it would be most for the benefit of those parties who were infants and married women that the company should be required to take the whole property, and to determine by which of the modes the compensation ought to be ascertained. After proceedings before the Master, the compensation was determined by arbitration, and the money paid into Court by the company; and the petition on which the question arose was presented in the matter of the act and in the cause, praying that the company might pay to the Petitioners and Plaintiffs and Defendants in the cause their costs, charges and expenses of and incidental to taking the land, and of and incidental to the former petition and the reference to the Master, and of the reference to the arbitrators, and of the agreement of reference, and of that application, and of the conveyance; and an order was made according to the prayer. In that case Lord *Langdale* said, "*Primâ facie* all the expenses ought to be paid by the company who have occasioned them. Where public companies, either for the public good or their private profit, come and violently take the property of others whether they like it or not, they ought to indemnify the persons against all the expenses which may be occasioned by such a proceeding."

The four cases I have hitherto referred to are clear and strong upon the subject, and they decide that the company must pay all the costs and expenses occasioned by their taking the lands.

(a) 12 Beav. 486.

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Then came the case of *Hore v. Smith and Re South Devon Railway Company's Act* (a), before the Lord Justice *Knight Bruce*, when Vice-Chancellor, who in the case I have already referred to had made the company pay all the costs. In *Hore v. Smith* the Vice-Chancellor took a different view, but no cases were cited on that occasion. I do not know whether there were any special circumstances in the case; but, at all events, none appear in the report. That petition was presented in the cause and in the matter of the act for payment to the Petitioner, who was an annuitant upon certain lands the subject of the suit, of money which had been paid into Court in the matter of the act by the company for land taken by them. The Master had found that considerable sums were due to the Petitioner for arrears of his annuity, and the Petitioner prayed that the money might be paid to him, and that the company might pay all reasonable charges and expenses of and incident to the application and consequent thereon, and all other costs, charges and expenses properly payable by the company under their act in respect of land taken by them. That was a case under a private act, but the clause in that act relating to costs is precisely the same as the 80th section of the Lands Clauses Act. The Vice-Chancellor *Knight Bruce* said the company must pay only such costs as they would have paid if the petition had been presented simply in the matter of the act and not in the cause; and the costs of the Defendants, the parties to the cause, must be costs in the cause. As I have said, I do not know whether there were any special circumstances in that case; but, at all events, Lord Justice *Knight Bruce* seems to have considered that the company need only pay the costs under

(a) 14 Jur. 55; S. C., 5 Railw. Cases, 592.

the act; and this decision seems contrary to his former decision in *Dinning v. Henderson* (a).

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The next case is *Patten v. Gatty*, before Lord Justice Turner, when V.-C. In that case real estate was devised to A. for life, with remainder to trustees for sale, with power to give receipts and discharges. Part of the estate was taken by the *Eastern Counties Railway Company* for the purpose of their railway, and the purchase-money was paid into Court under the provisions of the Lands Clauses Act. After A.'s death a suit was instituted for the administration of the estate of the testator, and on that suit coming on for further directions a petition was presented by one of the parties on the record, praying to *have the fund carried over to the credit of the cause*. It was presented in the cause and in the matter of the act, and came on to be heard with the cause. The petition had been served on the trustees for sale, and on all the other parties to the cause, several of whom appeared. The Master had found that the proceeds of part of the property sold consisted of the fund, the subject-matter of the application. The different parties who appeared asked that their costs might be paid by the company. Four counsel appeared for the different parties to the suit, and the counsel for the company cited *Hore v. Smith* (a), and suggested that the money might have been paid to the trustees on their application after the death of A., prior to the institution of the suit, without service on any other party, the sale being necessary. Vice-Chancellor Turner, however, held that the costs could not be separated, and that the costs of all parties served must be paid by the company according to the act.

(a) 2 De G. & Sm. 485.  
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(b) 14 Jur. 55.



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The next case is *Carpmael v. Profitt* (a), which, though not precisely the same case as the present, is analogous to it. The petitioner's land was taken by a railway company, and the purchase-money paid into Court in the matter of the railway company's act. The petitioner agreed for the purchase of other land which was sold in a suit. On the petition in the matter of the act there was the usual evidence as to title, which having been approved, the petitioner presented his petition in the cause and in the matter of the act to carry out the purchase; and Vice-Chancellor *Wood* made the company pay the costs of both petitions, including (as I think is apparent) the costs of the parties to the suit.

In the case of *Melling v. Bird* (b), which came before me in 1853, a suit had been instituted for the administration of the estate of a testator who had devised land in trust for sale. The company had taken part of the estate, and paid the purchase-money into Court in the usual way. The Plaintiffs, who were entitled to one-tenth of testator's estate, presented a petition in the cause and in the matter of the act for a transfer of the fund to the credit of the cause, and served the trustees and the parties entitled to the other nine-tenths, who appeared by four different solicitors, and it appeared to me that *prima facie* the company was bound to pay the costs of all parties properly served, but that it was oppressive for the parties to appear in the way they had done, and which had thrown unnecessary costs on the company; and therefore, although I made the company pay the costs of the trustees, I refused to make them pay the costs of the other parties interested

(a) 23 L. J., Ch. 165.

(b) 17 Jur. 155.

in the nine-tenths who had the same interest as the petitioner. In that case, therefore, I upheld the principle, but refused the costs on another ground, namely, because they had improperly severed in their appearance.

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The next case is *Re Picton's Estate* (a). In that case the petitioner was tenant for life of property which had been charged by settlement with 3,200*l.* in favor of other persons. Petitioner had filed a bill in the suit of *Picton v. Beete*, praying that the sums charged on the estate by the settlements, and the debts due from the testator under whose will the petitioner was tenant for life, might be raised by sale or mortgage of the estate. A decree was made directing a sale or mortgage of a sufficient part of the property to satisfy the charges thereon. Before the suit the company had taken a portion of the property, and paid the purchase-money into Court. The petitioner prayed that the money might be carried to the credit of the cause, and the Vice-Chancellor *Wood*, referring to the case of *Melling v. Bird*, said the principle of that case was the correct one, and he gave the trustees their costs, but refused costs to the other parties, ordering that such costs should be costs in the cause. The Vice-Chancellor *Wood* seems to have considered that I refused the costs in *Melling v. Bird*, not on the ground that they had unnecessarily increased the expense, but that such costs should not be paid by the company at all.

The last case to which I refer is *Wilson v. Foster* (b). In that case a suit had been instituted to administer the estate of Sir *H. Wilson*, under whose will Mrs. *Wilson*

(a) 3 W. R. 327.

(b) 26 Beav. 398.

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was tenant for life of real estate, with remainders over. A railway company had taken part of the land, and paid the purchase-money into Court in the usual way. A petition was presented by the tenant for life in the suit and in the matter of the act for reinvestment in land of part of the money. The remaindermen and trustees were served with the petition, and appeared. The Master of the Rolls said, "I am of opinion that the company cannot be required to pay the costs of the remaindermen or of the trustees. I concur in the decision in *Hore v. Smith*, and I am also of opinion that on application for the reinvestment of compensation money in land the parties ought to join in the petition, which they might have done under the act, if not in the cause. The trustees and the remaindermen who approved of this purchase and of the investment in land ought not to have appeared as respondents, and I cannot require the company to pay their costs. The company must pay all the costs of the Petitioner and the costs of serving the other parties with the petition, but not the costs of the appearance of the remaindermen and of the trustees, which in my opinion was unnecessary. All that was necessary was an affidavit of service on them. The extra costs may be paid out of the fund in Court." The effect of that case is, that it was necessary to present the petition in the cause as well as in the act, and therefore necessary to serve the other parties, but that they ought not to have appeared; and therefore the company ought not to pay their costs. In that respect only is there any variation between this case and those I have already referred to.

These are the cases in which a petition has been presented, not only in the matter of the act, but also in a cause; and it appears to me that the current of autho-

rities is strongly in favor of the company being required to pay the costs, not only of the Petitioner, but of the other parties whom it is necessary to serve. If indeed the parties appear in such a manner as to create unnecessary expense (as in *Melling v. Bird*), the company will not be required to pay such unnecessary expense; but that is an exception to the general rule that the company must pay the costs of all parties which have been occasioned by the company's taking the land; and I must say I fully concur in the opinion expressed by Lord *Langdale* that if companies are armed with the power of forcibly taking the land of others, they must be made to pay all the costs and expenses occasioned by their doing so. The exception in the 80th section of the act is that the company shall not be made to pay any costs occasioned by adverse litigation, but this is the only exception to the general principle.

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Applying then the general principle to the present case, this is a petition presented by trustees, there being a suit, asking for the reinvestment in land of the money, or part of it, which has been paid into Court by the company, and that the dividends may be paid to the tenant for life. The petition has been served on the tenant for life and remaindermen, and they appear. Now it seems to me that, the petition being necessarily presented in the cause as well as in the matter of the act, they were properly served; and they have not appeared in such a way as to make their appearance oppressive; and therefore I think the costs of all parties to this petition must be paid by the company.

But there was a former petition which was presented for the purpose of obtaining the direction of the Court as to the course to be taken with reference to the notice

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to treat served by the company. The company offered a certain sum for the property, but it was thought the land was worth more. The result was that an agreement was come to that the company should pay what they had offered; and one question now is as to the costs of that former petition. Applying the principle laid down in *Taylor's Case* and *Pickard v. Mitchell*, I think that those costs, having been occasioned by the company taking the land, should be paid by the company.

The only remaining question is, whether the company should pay the costs occasioned by their taking possession of the property before the agreement was entered into, without paying the compensation money into Court. That was a wrongful act on their part, and it became necessary to take certain proceedings in consequence of it, which were afterwards rendered unnecessary by the company paying the 850*l.* into Court. I do not think I can order the company to pay these costs. They are not costs of proceedings under the act which I can deal with upon the present petition. I apprehend, however, that the parties may get them out of the suit, but I cannot make the company pay those costs.

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17 C.D. 788

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June 25, 26, 27.  
July 25.

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Will.

Construction.

Substitution.

Alternative Gift.

LORING v. THOMAS.

THE material facts in this case were as follows :

Mary Williams duly made and executed her last will and testament in writing bearing date the 17th of November, 1838, and after certain directions and devises, proceeded as follows :—"I devise, appoint and bequeath unto my friends, the Reverend *Henry Cotton*, Doctor in Divinity, Archdeacon of *Cashel* in *Ireland*, the Reverend *William Lewis Davies*, Principal of *Elizabeth College* in *Guernsey*, *Anna*, the wife of Sir *John Wentworth Loring*, of *Lee House* in the county of *Southampton*, and the Reverend *Henry Nele Loring*, of *Rumsey* in the county of *Southampton*, clerk, all that my freehold messuage or tenement in which I now reside, with the outbuildings, garden and appurtenances thereunto belonging, situate and being

Gift of aliquot parts of a fund to the children of *A.*, the children of *B.*, the children of *C.* and the grandchildren of *D.* Provided that if any child or children of *A.*, or *B.* or *C.*, or any of the grandchildren of *D.*, shall die in my lifetime leaving a child or children living at my death and attaining twenty-one, the child or children of each

such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and be entitled to the same share or shares which his, her or their deceased parent would have been entitled to if living at my decease.

Held, 1. The word "children" could not be read grandchildren, so as to let in as original donee, the child of a deceased child of *A.*, who never had a child living at the date of the will.

2. The words "shall die" do not import future dying, but are equivalent to "shall be dead," or "shall have died."

3. A testator may so express himself as to cause a child of a deceased child to represent and be substituted for that deceased child; though he never intended a share for the deceased child :—and held that, in this case, the proviso was large enough to show an intention, that a child of a child deceased at the date of the will, and for whom therefore no share was intended, should represent or be substituted for that deceased child; and take the share, which if living at the date of the testator's death, the deceased child would have taken.

Christopherson v. Nayler, and other cases of that class, distinguished; and *Waugh v. Waugh* disapproved and overruled.

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in the parish of *Saint Peter in the East*, in the city of *Oxford* aforesaid, and all other my real estate wheresoever situate, to hold the same unto and to the use of the said *Henry Cotton, William Lewis Davis, Anna Loring* and *Henry Nele Loring*, their heirs and assigns, upon trust to permit the Reverend *Vaughan Thomas*, vicar of *Yarnton*, in the county of *Oxford*, and my sister *Charlotte* his wife, and the survivor of them, his or her assigns, to occupy and enjoy the same, or to receive the rents and profits thereof for and during the term of their natural lives, and the life of the longest liver of them; and from and after the decease of the survivor of them the said *Vaughan Thomas* and *Charlotte* his wife, upon trust, with all convenient speed, absolutely to sell and dispose of the said message or tenement, hereditaments and premises, either together or in parcels, and either by public auction or private contract, and to convey and assure the same unto the purchaser or respective purchasers thereof, or as he, she or they shall appoint. And I direct that the said *Henry Cotton, William Lewis Davies, Anna Loring* and *Henry Nele Loring*, and the survivors and survivor of them, his or her executors, administrators and assigns, shall stand possessed of the monies to arise and be produced by the sale of such hereditaments and premises upon the trusts following, that is to say, as to one-fourth part thereof upon trust to pay and divide the same equally between all and every *the children* of my deceased aunt *Dorothy Davies*, late of the town of *Southampton* aforesaid; as to one other fourth part thereof upon trust to pay and divide the same equally between all and every *the children* of my deceased aunt *Elizabeth Besson*, late of *Greenwich*, in the county of *Kent*, by her first husband, Captain *Nutt*, of the Royal Navy; as to one other fourth part thereof, upon trust to pay and divide

the same equally between all and every *the children* of my deceased uncle *Francis Cooke*, late of the city of *London*, esquire; and as to the remaining fourth part thereof, upon trust to pay and divide the same equally between all and every *the grandchildren* of my deceased aunt *Mary Dixon*, late of *Greenwich* aforesaid. Provided always, and I hereby declare, that in case any child or children of the said *Dorothy Davies*, *Elizabeth Besson* or *Francis Cooke*, or the grandchild or grandchildren of the said *Mary Dixon*, shall die in my lifetime, leaving any child or children who shall be living at my decease, and who shall live to attain the age of twenty-one years, *then and in such case it is my will that the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and shall be entitled to the same share or shares in the monies to arise by sale of the said freehold hereditaments which his, her or their deceased parent or parents would have been entitled to if living at the time of my decease, and such share to be divided between or among such children, if more than one, in equal proportions, and if there shall be only one child, then to go to such only child. Provided also, and my will is, that until such sale or sales the rents and profits of the said messuage or tenement, hereditaments and premises, or of such part thereof as shall from time to time remain unsold, shall be paid unto the person or persons who under the trusts hereinbefore contained would be entitled to the monies arising therefrom.* And the testatrix appointed her sister *Charlotte Thomas* sole executrix of her will.

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The testatrix departed this life on the 22nd of October, 1842, without having altered or revoked her

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will, and possessed of considerable real and personal estate; and her will was, on the 17th of November, 1842, proved by the said *Charlotte Thomas*.

Charlotte Thomas was the heiress-at-law and sole next of kin of the said testatrix.

By deed poll under the hand and seal of *Henry Cotton*, dated the 14th of February, 1844, *Henry Cotton* duly renounced and disclaimed all and every the estates, devises and bequests, trusts, powers, authorities and discretions by the will of *Mary Williams* respectively devised and bequeathed to and expressed to be reposed and vested in him jointly with the said *William Lewis Davies*, *Anna Loring* and *Henry Nele Loring*, or otherwise.

The children of *Dorothy Davies* and *Francis Cooke*, and the grandchildren of *Mury Dixon*, in the will of *Mary Williams* respectively mentioned, were very numerous, and they were all born prior to the date of the will. Some of the said children and grandchildren were dead at the date of the will, leaving children who survived the testatrix, and attained the age of twenty-one years. The last-mentioned children were also very numerous, and they, their representatives and assigns, claimed to be interested in three-fourth parts or shares of and in the monies to arise from the sale of the real estate by the will directed to be sold, and of and in the residuary personal estate of the testatrix; and they, or some of them, had disposed of or otherwise dealt with the interests which they respectively claimed therein.

Such of the children of *Dorothy Davies* and *Francis*

Cooke and of the grandchildren of *Mary Dixon* as were alive at the date of the will, survived the testatrix; and they, their representatives and assigns, claimed to be entitled to three-fourth parts of the said monies and residuary personal estate, to the exclusion of the children of such of the children of *Dorothy Davies* and *Francis Cooke*, and of the grandchildren of *Mary Dixon* as were dead at the date of the will; and they, or some of them, had disposed of, or otherwise dealt with, the interests which they respectively claimed in the said monies and residuary personal estate.

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Elizabeth Besson, in the will mentioned, had two children by her first husband Captain *Nutt*. One of these children died before the date of the will, under twenty-one and without having been married. The other child of *Elizabeth Besson*, by Captain *Nutt*, died before the date of the will, leaving children who survived the testatrix, and attained the age of twenty-one years. The last-mentioned children claimed to be interested in one-fourth part or share of and in the monies to arise from the sale of the said real estate and of and in the said residuary personal estate; and they, or some of them, had disposed of, or otherwise dealt with, the interests which they respectively claimed therein.

The Defendant *John William Thomas*, who was the legal personal representative of *Charlotte Thomas*, the heiress-at-law and sole next of kin of the testatrix, claimed to be entitled to the last-mentioned one-fourth part or share, to the exclusion of the last-mentioned children.

The Defendant *John Speed Davies* was the executor and legal personal representative of *Harriet Sylvester*,

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who was one of the children of *Dorothy Davies* mentioned in the will; *Harriet Sylvester* was alive at the date of the will, and for the purposes of the suit *John Speed Davies* represented the interests of all the children of *Dorothy Davies* and *Francis Cooke* who were living at the date of the will.

The Defendant *John Patten* was one of the grandchildren of *Mary Dixon* mentioned in the will, and for the purposes of the suit he represented the interests of all the grandchildren of *Mary Dixon* who were living at the date of the will.

The Defendant *Charles Nutt* was a child of *George Nutt*, who was one of the children of *Elizabeth Besson* by her first husband Captain *Nutt*, and who was dead at the date of the will; and for the purposes of the suit he represented the interests of all the children of such of the children of *Dorothy Davies*, *Elizabeth Besson* and *Francis Cooke* as were dead at the date of the will leaving children who survived the testatrix and lived to attain the age of twenty-one years.

The Defendant *James Dundas Down* was a child of *Louisa Down*, who was one of the grandchildren of *Mary Dixon*, who was dead at the date of the will. *James Dundas Down* had attained the age of twenty-one years, and for the purposes of the suit he represented the interests of all the children of such of the grandchildren of *Mary Dixon* as were dead at the date of the will leaving children who survived the testatrix and lived to attain the age of twenty-one years.

The bill prayed that the trusts of the will of *Mary Williams* might be carried into execution, and that her real and personal estate might be administered by and under the direction and decree of the Court; and that the rights and interests of all parties in the monies to arise from the sale of the real estate and the personal estate of *Mary Williams* might be ascertained and declared.

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Mr. *Baily* and Mr. *Smart*, for the Plaintiffs the trustees, took no part in the argument.

Mr. *Toller*, for the executors of children of *Dorothy Davies* who were living at the date of the will and also at the date of her death, claimed the first fourth entirely, as against grandchildren of *Dorothy Davies*, whose parents died before the date of the will.

The proviso is, if any child of *Dorothy Davies* shall die "*in my lifetime*, leaving any child living at my decease who shall live to attain twenty-one, such child shall stand in the place of his deceased parent, and take the share which the parent would have taken if living at my decease." The child of a child dying in the lifetime of the testatrix, is *to stand in the place of the parent, and take his share*. The parent, that is, any child of *Dorothy Davies* dying before the will, would take nothing, not being one of the class described; and no one can take in substitution of a person one of a class who would not come within the description of legatees. In other words, if the parent could not have taken, the child cannot take by substitution. It will be argued that under the words, "shall be entitled to the same share as the parent would have been entitled

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to if living at my decease," the gift over is not substitutional, but alternative. But that construction would be inconsistent with the prior language, "shall stand in the place of his or her deceased parent," language which plainly points to the parent, not as a mere representation of possible events, but as the root of the title. If the child is to stand in the place of the parent, that assumes a parent described as a donee. But here the child dead at the date of the testatrix, could not be a donee, and to stand in the place of that parent, is to stand in the place of one who could take nothing.

Mr. *J. Pearson* with him.

They cited *Porter's Trusts* (a); *Christopherson v. Naylor* (b); *Coulthurst v. Carter* (c); *Ive v. King* (d); *Gray v. Garman* (e); *Radcliffe v. Buckley* (f); *Moor v. Raisbeck* (g); *Pride v. Fooks* (h); *Tytherleigh v. Harbin* (i).

Mr. *Bazalgette*, for other parties in the same interest, pursued the same line of argument.

They referred to *Jarvis v. Pond* (k); *Waugh v. Waugh* (l).

Mr. *Shapter* and Mr. *Walford* for *Charles Nutt* (the child of *George Anson Nutt*, one of the children of *Eli-*

- (a) 4 Kay & J. 188.
- (b) 1 Mer. 320.
- (c) 15 Beav. 421.
- (d) 16 Beav. 46.
- (e) 2 Hare, 268.
- (f) 10 Ves. 195.

- (g) 12 Sim. 123.
- (h) 3 De G. & Jones, 252.
- (i) 6 Sim. 329.
- (k) 9 Sim. 549.
- (l) 2 Myl. & K. 41.

zabeth Besson by her first husband, and who was dead at the date of the will).

First. Without reference to the question of substitution, this will must be read as meaning to include "grandchildren" in the word "children." The cases show that if by extrinsic evidence you can show that by reading the word "children" literally, the will is made insensible, the Court will construe it "grandchildren."

Now *George Anson Nutt*, the father of *Charles Nutt*, died ten years before the date of the will. There were *no children* of Captain *Nutt* living at the date of the will. It may possibly be contended, where there are some children living at the date of the will and some dead, that the testator meant to use the word "children" literally. But where, as here, there were no children at all living for years before the date of the will, it would be absurd to suppose the testatrix could mean the word literally. She meant it in the popular sense, issue; and *Charles Nutt* takes as a grandchild, as one of a designated class.

They cited on this point *Wigram on Extrinsic Evidence* (a); *Fenn v. Death* (b); *Wythe v. Hurlstone* (c); *Gale v. Bennett* (d); *Crook v. Brooking* (e); *Royle v. Hamilton* (f); *Reeves v. Brymer* (g); *Crook v. Whitley* (h); *Woodhouselee v. Dalrymple* (i); *Kelly v.*

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| (a) Page 42 (2nd edit.); | (f) 4 Ves. 437. |
| p. 73 (4th edit.) | (g) <i>Ibid.</i> 692. |
| (b) 23 Beav. 73. | (h) 7 De G., M. & G. |
| (c) 2 Amb. 554. | 490. |
| (d) <i>Ibid.</i> 681. | (i) 2 Mer. 419. |
| (e) 2 Vern. 50, 106. | |

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Hammond (a); *Edmunds v. Fessey* (b); *Carter v. Bentall* (c).

Next. If not included under the description of children, are we not entitled under this clause, as a child of a person who if living at the death of the testatrix would have been entitled? That is the real question.

It is not the dry question of substitution, as in the cases where the language is merely, that the child of a deceased child shall take the parent's share. There it may reasonably be argued upon the authorities (though very inconsistently with probable intention) that, as the parent could take no share, the child described as taking the parent's share, can take nothing. But that is not the language of this will; the language is, that the child is to take the share which the parent would have taken if living at the death. Apply that to the facts. *G. Anson Nutt* was a child of *Mrs. Besson*, he did die during the testatrix's life, whether before or after the will is immaterial in this view. He fulfils the conditions of the will in these respects, that he was a child, and died during the testatrix's life, leaving a child who survived the testatrix; and it is clear that if *G. Anson Nutt* had survived the testatrix he would have been entitled. I stand therefore entitled, not by way of substitution strictly, but by way of gift in the alternative; that is the true construction of the proviso, and all the cases and arguments about pure substitution have no application. I claim under a substantive gift to grandchildren; to the children of those who, if living at the death of the testatrix, would unquestionably have taken. I do not claim *the share* of my parent; I claim

(a) 26 Beav. 36.

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(b) 30 Law J., N. S., Ch.

(c) 2 Beav. 551.

as a described class, the share which another class described would have taken, if certain events had happened.

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They referred to *Fenn v. Death*(a); *Manning v. Chambers*(b); *Shephard's Trusts*(c); *Hannam v. Sims*(d).

Mr. *Collins* for the grandchildren of *Dorothy Davies* whose parents were dead at the date of the will, there being also grandchildren whose parents were living at the date of the will, took the same line of argument as in the second head of Mr. *Shapter's* argument; and cited *Hewet v. Ireland*(e); *Early v. Benbow*(f); *Ringrose v. Bramham*(g); *Doe v. Hallett*(h).

Mr. *Baggallay* and Mr. *Schomberg* for other parties in the same interest.

Mr. *Fleming* and Mr. *Charles Hall* for other parties.

Mr. *Osborne* and Mr. *Nichols* for one of the grandchildren of *Francis Cooke* whose parent was dead at the date of the will, there being grandchildren whose parents were living at the date of the will.

They argued also on the footing of the gift not being substitutional, but an independent gift in the alternative, to grandchildren, whose parents would have taken if living at the death of the testatrix.

They referred in particular to *Smith v. Smith*(i), *Ive v. King*(k) and *King v. Cleaveland*(l), as showing the

(a) 23 Beav. 73.

(b) 1 De G. & Sm. 286.

(c) 1 Kay & J. 269.

(d) 2 De G. & J. 151.

(e) 1 P. Wms. 426.

(f) 2 Coll. C. C. 342.

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(g) 2 Cox, 384.

(h) 1 Mau. & Sel. 124.

(i) 8 Sim. 352.

(k) 16 Beav. 46; see p. 53.

(l) 26 Beav. 26, 126.

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distinction between substitutional gifts and gifts to two distinct classes in the alternative.

Mr. *Shebbeare* and Mr. *Haynes* also appeared for other parties.

Mr. *Glasse*, for the heir-at-law and next of kin, claimed one-fourth by intestacy.

Mr. *Toller* replied on the question of substitution or alternative gift, and cited *Ashling v. Knowles (a)*.

[On the question whether the grandchildren could take under the word children, his Honor delivered judgment at the conclusion of the argument as follows.]

The VICE-CHANCELLOR.

As to the use of the word "children," whether that word may be read as including grandchildren, that applies to the case of the grandchild of *Elizabeth Besson* only.

It is contended that the testatrix must have known the facts as to the state of this and the other families, and there is evidence to that effect—that she must have known that *Elizabeth Besson* had no child living at the date of her will, and therefore could not have intended to make a gift to nobody. It is said she must have used the word "children" inadvertently, and meant grandchildren. That must mean, either that she meant to write grandchildren when she wrote children, or else that she used the word "children" as coextensive with grandchildren.

(a) 3 Drew. 593.

A third alternative construction would be, that she thought the grandchildren really were children; but that would be glaringly inconsistent with the assumption fairly based on the evidence, that she was acquainted with everything relating to the state of the family. As to the two previous suppositions, we find that not only there, but in a subsequent passage in the proviso, she clearly knew the distinction between children and grandchildren.—[His Honor referred to the passages *underlined* in the proviso, ante, pp. 498, 499, and proceeded.] In that part, as to *Mary Dixon*, she makes the very distinction. She must clearly, therefore, have known the different meanings of the two words. And I am of opinion that that part of Mr. *Shapter's* argument cannot be maintained.

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[On the principal point his Honor took time to consider, and on the 25th of July, delivered the following judgment.]

The VICE-CHANCELLOR.

The question is this (taking the gift of one-fourth as an instance), whether the children of that child of *Dorothy Davies*, who was dead at the date of the will, are entitled to take a share of that one-fourth. A similar question arises with respect to each of the other three-fourths; but it will simplify the consideration of the matter to take the case of the first fourth as if it were the only case upon which the question arises; for, whatever is the right decision for that case, must equally be right with respect to the others.

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We have, then, a bequest of one-fourth of the monies to arise from the sale of real estate, which is to be sold

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after the deaths of two tenants for life, to the children of the testatrix's then deceased aunt *Dorothy Davies*, with a proviso, that in case any child of *Dorothy Davies* should die in the testatrix's lifetime, leaving children who should be living at the testatrix's death and who should live to attain the age of twenty-one, such last-mentioned children should represent and stand in the place of their deceased parent, and should be entitled to the same share which their deceased parent would have been entitled to if living at the testatrix's decease.

Did the testatrix by this proviso intend to include only the children of any child of *Dorothy Davies* who might die between the date of the will and her (testatrix's) decease; or did she mean to include also the children of that child of *Dorothy Davies*, who was dead at the date of the will?

In order to prevent confusion of language I will describe the first generation (*i.e.*, the children of *Dorothy Davies*) by the term "children," and when I speak of the second generation (*i.e.*, the children of those children) I will use the term "issue," or "issue of children," otherwise the perpetual recurrence of the word "children," as applied to two different generations, will occasion perplexity. And for brevity's sake I will use the term "predeceased children" to signify those of the first generation who were dead at the date of the will.

Now, of course the question is one entirely of intention, and it is obvious that in cases of this kind a testator may mean to *include* as objects of his bounty, or he may mean to *exclude*, the issue of the predeceased children. When a testator directs that issue shall represent or stand in the place of or be substituted for a de-

ceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will.

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The solution of the question, which of the two he intended, must of course depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both.

Before I proceed to examine in detail the language of this will, I will make one or two preliminary observations which (although they are little better than truisms) it will be useful to bear in mind, not only in considering the terms of this will but also with reference to some of the decided cases bearing on the question.

And first, I would observe, that with reference to a bequest to the children of *A.*, there is this obvious distinction between a child of *A.* living at the date of the will and a predeceased child of *A.*, that the former is one of those whom the testator intends to benefit by the bequest, whereas the latter not only cannot take under such a bequest, but he is not intended by the testator to benefit, for no one intends to make a bequest in favor of a dead person. If, therefore, a testator, in directing

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that the issue of a deceased child shall represent or stand in the place of their parent, uses language importing that they shall take the share which he intended for the parent, of course the issue of a predeceased child cannot be included, because the testator could not have intended to give any share to a child then already dead.

On the other hand, I would observe that a predeceased child of *A.* and a child of *A.* living at the date of the will stand upon the same footing in this respect : that not only they are both equally children of *A.*, but they both equally answer the description of children of *A.* who would, *if they were living* at the testator's death, have been entitled to a share under a bequest to the children of *A.* That description is merely hypothetical, it speaks not of what *will* happen, or even of what *may* happen, but only of what *would have happened* upon a certain hypothesis ; and of course putting a hypothetical case does not at all involve the assumption that the hypothesis is true, or even that it is possible. Suppose a testator, having by his will made a bequest to the children of *A.*, were to add this : one child of *A.* (*Thomas*) is already dead, and I direct that his issue shall represent him and stand in his place, and shall be entitled to the same share which *Thomas* would have been entitled to if living at my decease. Surely that language would be perfectly correct and appropriate. *Thomas*, though already dead, and therefore incapable of taking a share, and not intended to take a share, would, upon the hypothesis of his being alive at the testator's death, have been entitled to a share under the bequest to the children of *A.*, and the testator would be correctly speaking of the share which *Thomas* would

have been entitled to upon that hypothesis, although the hypothesis is impossible.

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I proceed now to consider the terms of this bequest.

It is to be remarked that the testatrix does not express her intention in favor of the children of *Dorothy Davies* and in favor of the issue of deceased children in one and the same clause, but in two distinct clauses. It is not like *Tytherleigh v. Harbin (a)*, a bequest in one single clause to such of the children of *A.* as shall be living at a certain period, and to the issue of such of them as shall be then dead; but there is first a bequest to the children of *Dorothy Davies*, and then, by a separate and distinct clause or proviso, the testatrix directs that the issue of deceased children shall represent their parent. But this circumstance does not appear to me to govern the question. There is nothing to preclude a testator, after having made a bequest in favor of a certain class, from directing by a subsequent clause (whether by way of proviso or otherwise) that new objects, not comprehended in or connected with the first-mentioned class, shall share with the members of that class. A testator, for example, may make a bequest to the children of *A.*, and then by a subsequent proviso direct that the children of *B.* shall share with the children of *A.*; and in such case the effect would be precisely the same as if by one single clause he had bequeathed to the children of *A.* and to the children of *B.*

The question then is, who are the objects intended by the proviso. According to the fair and just interpretation of the language of the proviso, is the direction that

(a) 6 Sim. 329.

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the issue of deceased children of *Dorothy Davies* shall represent and stand in the place of their parents restricted to the case of those children only who were living at the date of the will, and who might afterwards die in the testatrix's lifetime leaving issue? or is it expressed in terms so large and general as to include also the case of any children of *Dorothy Davies* who were already dead leaving issue? It appears to me that, with one exception, every word of the proviso is adapted to include both of these cases. I say with one exception, and that exception is to be found in the words "shall die." The words are, "in case any child or children of the said *Dorothy Davies* shall die in my lifetime." Those words "shall die," in their strict and proper meaning, point to a future death, and if they ought to be construed according to that strict and proper meaning, then of course they can only refer to persons living at the time when they were penned, and cannot include any person then already deceased. If, instead of the words "shall die," the testatrix had used the words "shall be dead," or "shall have died," those words would have referred as much to predeceased children as to children subsequently dying. I will reserve the consideration of the question, what construction ought to be put upon the words "shall die in my lifetime," until after I have examined the other parts of this proviso. And first, with respect to the words "in case any child or children of the said *Dorothy Davies* shall die in my lifetime." What is the meaning of the words "any child or children of the said *Dorothy Davies*?" It is not "any of the said children of *Dorothy Davies*," nor "any such child or children of *Dorothy Davies*," nor "any of the children of *Dorothy Davies* to whom I before bequeathed the one fourth." There is no reference to any particular class or portion of the children of

Dorothy Davies, but the words are general, "any child or children of *Dorothy Davies*;" and those words, according to their natural and proper construction, embrace all children of *Dorothy Davies*, as well those who were then already dead as those who were then living.

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Proceeding, then, to the subsequent part of the clause, what is to be the consequence of any child or children of *Dorothy Davies* dying in the testatrix's lifetime. Disencumbering the sentence from superfluous words, which do not affect the sense, the testatrix directs thus:—"Then and in such case the children of each such child so dying in my lifetime shall represent and stand in the place of their deceased parent, and shall be entitled to the same share which their deceased parent would have been entitled to if living at the time of my decease." The testatrix does not say "shall be entitled to their parent's share," nor does she say "shall be entitled to the share hereby intended for their parent," but she says "shall be entitled to the same share which their deceased parent *would have been entitled to* if living at the time of my decease." The share which she says that the children of a deceased child shall be entitled to is not a share which that deceased child will take, or *can* take, or *is intended* to take; but it is the share which that deceased child would have been entitled to upon a certain hypothesis, viz., the hypothesis of that child being alive at the testatrix's death; and unquestionably *Thomas*, the predeceased child of *Dorothy Davies*, would, upon the hypothesis of his being alive at the time of the testatrix's death, have been entitled to a share under the bequest to the children of *Dorothy Davies*.

Then with respect to the words "shall represent and

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stand in the place of their deceased parents." I confess I cannot see why the children of a predeceased child should not represent and stand in the place of their deceased parent, not indeed in respect of any share which that parent could take or was intended to take, for being already dead he neither could take nor was intended to take any share, but in respect of the share which that parent would have been entitled to if living at the testatrix's decease, and that is the share in respect of which the testatrix directs that the children of deceased children are to represent and stand in the place of their deceased parent.

It appears to me, then, that the only words in this proviso which afford any ground for contending that it excludes the case of a predeceased child of *Dorothy Davies* are the words "shall die." And the question is whether those words are to be construed as pointing to a future death, which is their strict grammatical import, or the event of being dead at a certain future period, without reference to the particular time at which the death may have occurred.

Now there are many cases in which words in a will, which, according to their strict grammatical import, denote the future happening of a certain event, have been held to signify the fact of the event having happened, whether it actually occurred before or after the date of the will. I will only refer to *Christopherson v. Naylor* (a), which is *in pari materia* with the case now before the Court. There the testator gave 800*l.* to each of the children of his brother and three sisters which should be living at his (testator's) decease, and added,

(a) 1 Mer. 320.

"But if any child or children of my said brother and sisters *shall happen to die in my lifetime* and leave issue, then the legacy or legacies hereby intended for such child or children so dying shall be for his, her or their issue." The question was (as it is here), whether the issue of a predeceased child could take. Sir *William Grant* decided against them on another ground; but with respect to the words "shall happen to die" (which, according to their strict grammatical import, point to a future death just as strictly as the words "shall die," in the present case) he expressed himself thus:—"The question in this case does not depend on the words 'shall happen to die in my lifetime.' Though, according to strict construction, importing futurity, those words might have been understood as speaking of the event at whatever time it may happen." I consider this opinion of Sir *William Grant* as high authority for construing the words "shall die in my lifetime" in the sense of "shall have died in my lifetime."

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But, further, that such was the sense in which the testatrix used those words appears to me clear from the context. For the passage is this (omitting superfluous words), "In case any child or children of the said *Dorothy Davies* *shall die* in my lifetime leaving any children who shall be living at my decease, and *who shall live to attain the age* of twenty-one years, then and in such case the children of each such child so dying shall represent and stand in the place of their deceased parent, &c." Now if the words "shall die" must be construed to refer only to a future death, so as to exclude such children of *Dorothy Davies* as had died before the date of the will, then the words "who shall live to attain the age of twenty-one years" must equally be construed to

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refer only to a future attainment of twenty-one years, so as to exclude such children of a deceased child of *Dorothy Davies* as had attained twenty-one before the date of the will; and the consequence of such construction would be this, that if a child of *Dorothy Davies*, living at the date of the will, afterwards died in the testatrix's lifetime leaving children, all of whom had attained twenty-one before the date of the will, there would be no representation in that case. This would be so contrary to the testatrix's obvious intention, that the words "shall live to attain the age of twenty-one years" must be construed to refer only to the fact of attaining twenty-one, without regard to the question whether the attainment of twenty-one happened before or after the date of the will, and so the words "shall die" must be construed to refer to the fact of death, without regard to the question whether the death occurred before or after the date of the will.

Upon the whole I am of opinion that the language of the proviso, according to its true construction, is so wide and general as to exclude not only the case of such children of *Dorothy Davies* as were living at the date of the will and might afterwards die in the testatrix's lifetime, but also the case of such children of *Dorothy Davies* as were already dead at the date of the will leaving children; and that therefore the children of *Thomas*, who was dead at the date of the will, must be held to represent him and stand in his place, so as to take the share which *Thomas* would have taken if he had been living at the death of the testatrix.

The same reasons will apply to the children of the predeceased child of *Elizabeth Besson*, and to the children of the four predeceased children of *Frances*

Cooke and to the children of the two deceased grandchildren of *Mary Dixon*.

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Of the decided cases bearing upon the question there is one only which seems to me to conflict with the view I have taken of this case, viz., *Waugh v. Waugh*.

I will now advert to the cases on the question, whether the issue of the predeceased children are to take.

The first case cited was *Christopherson v. Naylor* (a), in which there was a gift by will to each and every the child and children of the testator's brother and sisters which should be living at the time of his death, but if any child or children of his said brother and sisters should happen to die in his lifetime and leave issue, then the legacy or legacies thereby intended for the child or children so dying should be for his, her or their issue. That is not the case of one sum among the children of A., but it is a distinct legacy to each child of A., and the proviso does not direct that the issue shall take the share which the parent would have taken, but that the legacy intended for such children shall go to their children; and the Master of the Rolls in his judgment observes:—"Nothing whatever is given to their issue except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But of the nephews and nieces of the testator none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object

(a) 1 Mer. 320.

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of substitution, and to give them original legacies would be in effect to make a new will for the testator."

It appears to me, from the reason given by the Master of the Rolls, that if the words in that case had been the same as in this case, not speaking of the legacy intended for the child, but the legacy the child would have taken if living at the testator's death, his decision would have been different. The language of the two wills is at any rate very distinguishable.

The next case bearing on the point is *Butter v. Ommoney* (a), in which the testator bequeathed the residue of his estate to such children of B. as should be then living, and as to such of them as should be then dead leaving children, he directed that the children should stand in the place of their parents; and the question was, whether the children of such children as died in his lifetime were entitled to a share of the residue, the children who died in his lifetime being all dead at the date of the will. The Vice-Chancellor held that the children meant those to whom he had given the residue, and therefore excluded the children of the children who had died in the testator's lifetime.

In the next case of *Gray v. Garman* (b), which was very similar to the last case, there was a similar decision.

In *Tytherleigh v. Harbin* (c), the issue of a predeceased child were held entitled to take, on the ground that the words of the will referred not to the gift previously made, but to all children generally.

(a) 4 Russ. 73.

(b) 2 Hare, 268.

(c) 6 Sim. 333.

In the two cases of *Giles v. Giles* (a) and *Jarvis v. Pond* (b), the decision was in favor of the issue of a pre-deceased child participating; but great difficulties were got over in arriving at that conclusion in those two cases; and in the latter case, the Vice-Chancellor, though coming to that conclusion, observed that there was some violence to the language of the will in assigning a share to the father or mother when they would never have taken any.

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In *Coulthurst v. Carter* (c), where the gift was to the children of A. A. (deceased) then living, and the issue then living of any child of A. A. dying in the lifetime of the niece, such issue to take the parent's share, the Master of the Rolls held that the issue of a child of A. A. who died before the will were entitled.

[His Honor also referred to *Smith v. Pepper* (d).]

These are the only cases bearing directly upon the present case, and it appears to me that, with the exception of *Waugh v. Waugh*, none of them conflict with the view which I have taken, and I think some of them tend strongly to support it.

With regard to *Waugh v. Waugh* (e), that case is directly in conflict with my opinion. In that case the testator gave a sum of money in the event of the death of his nephew *John Waugh* without leaving issue, to be equally divided among all the brothers and sisters of *John Waugh* who should be living at the time of his death and the children then living of any of his brothers and sisters who should have previously departed this

(a) 8 Sim. 360.

(b) 9 Sim. 549.

(c) 18 Beav. 421.

(d) 27 Beav. 86.

(e) 2 My. & K. 41.

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life, but so that the children of such deceased brother and sister should take only the shares which their parent would have taken if living. The Master of the Rolls observed, that it was plain that the words used in the first part of the bequest would comprise *Eleanor Waugh*, for she was the child of *Alexander Waugh*, a brother of *John* who had died before *John*; but by the subsequent part of the gift it was expressed that the children of a deceased brother of *John* were to take only the share which their parent would have taken if living, and the parent of *Eleanor* being dead at the date of the will could not share in the bequest, and therefore *Eleanor* took nothing. I take the liberty of not concurring in that reasoning, which I conceive is not sound for the solution of the case, and indeed *Waugh v. Waugh* has been considered as overruled, which in effect it was in *Tytherleigh v. Harbin*, in which case Vice-Chancellor *Shadwell* observed that the decision in *Waugh v. Waugh* might have been supported on the ground of the evident intention of the testator, and therefore that he did not consider that he was overruling that case. I think that the decision in *Waugh v. Waugh* has been commented on in such a manner that it is no longer to be considered as an authority.

I will make one observation with regard to the language which is used in the cases and text books on this subject. The question has been often treated of as one of an original gift or by way of substitution; and I do not mean to say that that language is not correct in the sense in which it is intended, but it is apt to mislead. In many cases in which the issue of a deceased child are decided to have been included, the issue of that child is substituted for or represents the deceased parent and receives the share which the parent would have taken, not

only by way of substitution but as an original gift, by reason of his having been alive at the time of the bequest; this, therefore, is a case of original as well as substitutionary bequest. Taking also the case of a child who was living at the date of the will but died in the life of the testator: this is stated to be a case of substitution, and so it is; but it is also a case of original bequest, because, if it were not, the issue would take nothing.

The question really is one of intention, whether the testator intended to make the gift by way of substitution of the issue only of those who were living at the date of the will, or to include the issue of any predeceased child; and of course this intention can be taken from the language of the will.

A declaration was directed in conformity with the decision.

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February 23.

June 11.

*Statutes.
Construction.*HUGHES v. CHESTER AND HOLYHEAD
RAILWAY COMPANY.

A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital.

An act authorizing the making of a railway, through land abounding with minerals, contained a clause reciting the nature of the lands, and that the railway would intercept and obstruct the free intercourse between the adjacent lands, and so

deprive them of their natural advantages; and it gave liberty to owners or occupiers to make any railway across the company's railway, "for the benefit of themselves and of all and every other person or persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require."

Held, by Mr. Baron Channell and Vice-Chancellor Kindersley, *dissentiente Willes, J.*, that this power was confined to making a railway for the purposes of their own business in respect of the lands, and did not authorize the making of a railway for the purpose of carrying passengers and goods for hire.


THE material facts and instruments in this case were stated in the bill as follows:—

The Plaintiff is seised of or entitled in possession to large estates in the counties of *Flint* and *Denbigh* for an absolute estate of inheritance in fee simple in possession.

Very considerable portions of the said estates abut on the *Irish Sea*, or what in the act of parliament first hereinafter mentioned is called the *Saint George's Channel*, and the said estates extend in many places in a direct line from the margin of the sea or channel for a considerable distance inland.

Two of the farms so belonging to the Plaintiff as aforesaid are called and known respectively by the names of *Foryd Lodge Farm* and *Foryd Fawr Farm* and comprise together 600 acres or thereabouts, and are situate in the parish of *Abergele* and county of *Denbigh*.

The said farms are bounded on the north by the said *Irish Sea*, or what in the said act of parliament is called the *Saint George's Channel*, on the west by the river *Foryd*, on east by lands belonging in part to the representatives of *Charles Calveley* deceased, and on the south by other lands of various owners.

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The said river *Foryd* is a tidal stream, formed by the confluence of the rivers *Clwyd* and *Elwy*, which form a junction near the town of *Rhyddlan*. The said river falls into the *Irish Sea*, or what in the said act of parliament is called the *Saint George's Channel*, at or near to a town called *Rhyl*, in the said county of *Flint*. The said town of *Rhyl* is on the east bank of the said river *Foryd*, immediately opposite to the said *Foryd Fawr* and *Foryd Lodge Farms* and is a rapidly increasing town, being a much frequented and fashionable watering place. There is frequent communication by steamboats between the said town of *Rhyl* and the town of *Liverpool*, one of the piers where steamboats start for *Liverpool* being a pier at the point where the said *Foryd Fawr Farm* abuts upon the said *Foryd Lodge Farm*.

An act of parliament was made and passed in the session of parliament holden in the 7th and 8th years of the reign of her present Majesty, chapter 65, intituled "An Act for making a Railway from *Chester* to *Holyhead*."

By the said act, section 1, it was enacted, that the several persons therein mentioned, and all other persons and corporations who had subscribed or who should thereafter subscribe towards the said undertaking, and their several successors, executors, administrators and assigns, should be and they were thereby united into a

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company for making and maintaining the said railway and other works by the said act authorized, and for other the purposes therein declared, according to the provisions of the said act, and for that purpose should be incorporated by the name of the *Chester and Holyhead Railway Company*, and by that name should be a body corporate with perpetual succession, and should have power to purchase and hold lands for the purpose of the said undertaking within the restrictions therein contained.

By the said act, section 236, it was enacted, that the railway thereby authorized to be made should commence by a junction with the *Chester and Birkenhead Railway* in the parish of *St. Oswald* in the liberties of the city of *Chester* and county of the same city, and should pass through the several parishes or places therein mentioned, or some of them, including amongst other parishes the said parish of *Abergele*, in the said county of *Denbigh*, and should terminate at or near a certain field in the parish of *Holyhead* in the act mentioned.

By the said act, section 334, it is enacted as follows, that is to say:—"And whereas the line of the said intended railway (meaning the said railway from *Chester* to *Holyhead*) skirts the margin of the estuary of the *Dee* and *Saint George's Channel*, in the counties of *Flint*, *Denbigh* and *Caernarvon*, between the cities of *Chester* and *Bangor*, which will have the effect of obstructing the free intercourse and traffic between the lands on the banks of the said estuary and channel and the sea, and so depriving such lands of their natural advantages of position as respects the said estuary and channel; and whereas the said lands abound with coal and other minerals and stones suitable for quarries, which

latter in some instances belong to and are the property of of persons not the owners of the surface of such lands and hereditaments, and are also well situated for the erection of works and manufactories, and for other purposes of commerce, and it is desirable to give facilities of access between the said lands and the sea, and from the sea and the lands on the lower or sea side of the said line of railway to parts inland : be it therefore enacted, that nothing herein contained shall extend to prevent the owner or owners, lessee or lessees, occupier or occupiers, for the time being of any lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal, and other mines, minerals or quarries, lying near to or adjoining the said railway, and in parts adjacent, at any future time or times, and from time to time hereafter, as occasion shall be and require, from making any railway, tram or other roads, ways, approaches or watercourses across the said railway hereby authorized to be made, so that any such railways, tramroads and other roads, approaches and watercourses in every instance be taken above or below such line of railway, and to use such railways, tramroads or other roads, ways, approaches and watercourses for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require, so that any such railway, tramroad, roadway, approach or watercourse do no injury to and do not prevent the free passage over, upon and along the said railway hereby authorized to be made by the said company, and so that all the works connected with the passing thereof over or under the said railway be done under the superintendence and to the satisfaction of the engineer for the time being of the said company, and according to plans to be approved by him ; and the said

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company shall not be entitled to demand, have or receive any tonnage or compensation whatsoever for the making of such way or the passing of any goods, persons, horses, carts and carriages, mines, minerals, goods, merchandize, or other matters and things, along any such railway, tramroad, way or approach, or compensation for any watercourse so to be made across the said line of railway hereby authorized to be made."

The said *Chester and Holyhead Railway* was duly made and completed shortly after the passing of the said act of parliament, and in accordance with the provisions thereof, and of other subsequent acts of parliament relating thereto.

The line of the said railway going in the direction from *Chester* to *Holyhead* passes by a bridge over the said *River Foryd*, and thence traverses in a direction very nearly due east and west a considerable portion of the said farm belonging to the Plaintiff, and known as the "*Foryd Fawr Farm*," the result being that the said railway as so constructed intersects the said lastly mentioned farm, and obstructs the free intercourse and traffic between the said lands of the Plaintiff which lie on the higher or land side of the line of the said railway and the other parts of the lands of the Plaintiff which lie on the lower or sea side of the line of the said railway, and it obstructs the facilities of access between the lands of the Plaintiff on the higher or land side of the said line of railway and the sea, and between the lands on the lower or sea side of the said line of railway to parts inland.

The lands of the Plaintiff which are situate on the higher or land side of the said line of railway, and which prior to the construction of the said railway ad-

joined that part of the said *Foryd Fawr Farm* which was taken for and now forms the site of the said line of railway, are of large extent, and the only direct communication between the said lands on the higher or land side of the said line of railway and the sea, and between the lands of the Plaintiff on the lower or sea side of the said line of railway and the parts inland, was across that part of the said *Foryd Fawr Farm* which is now traversed by the said railway.

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The only present direct communication between those parts of the Plaintiff's said lands which are situated on the higher or land side of the said line of railway and the sea, and between those parts of the Plaintiff's said lands which are situated on the lower or sea side of the said line of railway, to the parts inland is by means of a farm road, which passes under the line of the said *Chester and Holyhead Railway*, but such road does not afford sufficient facilities of access between the said lands of the Plaintiff on the higher or land side of the said line of railway and the sea, or between the said lands of the Plaintiff on the lower or sea side of the said line of railway to the parts inland.

The Plaintiff, in pursuance of the powers conferred upon him by the section 334 of the said act of parliament, and for the purposes therein mentioned, was and is desirous of making a railway across and under the said *Chester and Holyhead Railway*, under the line thereof; and in accordance with such his desire his solicitors, Messrs. *Humberston, Helps & Parker*, on the 21st day of March, 1859, wrote and sent to the general manager of the said company a letter of that date, which was in the words and figures or of or to the purport and effect following (that is to say):—

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“ Mr. *Hughes* and the *Chester and Holyhead*
Railway Company.

“ *Chester*, March 21st, 1859.

“ Dear sir,—Will you be good enough to bring before your board, at your earliest convenience, the desire of Mr. *Hughes* to construct a railway under the *Chester and Holyhead Railway* at *Foryd*, at about the point where Mr. *Hughes* has at present a farm road under the railway to connect his lands on the north or sea side of the railway with his lands on the south or land side. Mr. *Hughes* seeks to make this railway under the 334th section of your act, and of course will do the works under the superintendence and to the satisfaction of your engineer, to whom we will have the necessary plans sent for approval on hearing from you to that effect.

“ We are, dear sir, yours faithfully,

“ *Humberston, Helps & Parker.*

“ *J. O. Binger*, Esq.


“ *Chester and Holyhead Ry.* Office,

“ *Chester Station.*”

Then followed a considerable correspondence, the effect of which was that Mr. *Hughes* desired the consent of the company to make a railway under the *Chester and Holyhead Railway*, to be used for purposes of general traffic as a carrying line, as well as for conveying his own minerals and goods; and that such consent was refused, as to the use of the railway for general purposes.

The Plaintiff then commenced his railway without the consent of the company, and the company endeavoured to prevent him by force; and the bill alleged that they

threatened and intended to continue to interfere with his making the railway. This bill was then filed, to have it declared that the Plaintiff was entitled under the 334th section of the act to construct his railway, and to restrain the company from interfering with his execution thereof.

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A motion for an injunction pursuant to the prayer of the bill had been made ; which coming on to be heard before the Lords Justices, their Lordships expressed no opinion on the effect of the 334th clause, leaving that to be determined at the hearing of the cause, and granting in the meantime an injunction upon terms. The cause now came on to be heard, before Vice-Chancellor *Kindersley*, assisted by Mr. Justice *Willes*, and Mr. Baron *Channell* ; and the sole question argued was, whether the 334th clause of the act of parliament, set out in pp. 526, 527, authorized the construction by the Plaintiff of a railway, to be used for purposes of general traffic in carrying goods and passengers for hire, or only for the purposes of his own property, for carrying for himself and for such persons as he should authorize.

Mr. *Glasse*, Mr. *Giffard*, Mr. *Mellish* (of the Common Law Bar), and Mr. *Bristowe* appeared for the Plaintiff.

The *Attorney-General*, Mr. *Baily*, Mr. *Speed*, and Mr. *Phipson* (of the Common Law Bar) appeared for the Defendants, the *Chester and Holyhead Company* and the *London and North Western Company*, who were made parties and were in the same interest as the *Chester and Holyhead Company*.

The arguments are fully referred to in the judgments.

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The question in this case depends upon the construction to be placed on the 234th section of the 7 & 8 Vict. chap. 45, which is entitled "An Act for making a Railway from *Chester to Holyhead*." Some other sections in the act were properly brought under our notice, but these sections do not appear to me to throw much light upon the subject, and I do not think it necessary to refer to them particularly. The preamble to the 234th section contains two recitals, which it is necessary to notice.

The first of these recitals is, that the line of the intended railway skirts the margin of the estuary of the *Dee* and *St. George's Channel* in the counties of *Flint*, *Denbigh* and *Carnarvon*, between the cities of *Chester* and *Bangor*, which will have the effect of obstructing the free intercourse and traffic between the lands on the banks of the said estuary and channel and the sea, and so depriving such lands of the natural advantages of position as respects the said estuary and channel.


The second recital is that the said lands, that is, the lands referred to in the first recital, abound with coal and other minerals, and stones suitable for quarries, which latter (meaning thereby, as I understand, the coal and ore minerals and stones suitable for quarries) in some instances belong to and are the property of persons not the owners of the surface of such lands and hereditaments, and are also (that is, the lands are) well situated for the execution of works and manufactories, and for other purposes of commerce, and it is desirable to give facilities of access between the said lands and the sea, and from the sea and the lands on the lower or sea side of the said railway to parts inland.

Immediately following these two recitals comes an enacting clause, beginning with the words, "Be it therefore enacted," &c.

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The meaning of the words so following the recitals in the preamble may possibly be better arrived at if the enacting words immediately following the recitals are read in connection with and as if immediately followed by the words in the concluding member of the section; and the conditions on which the railway over the Defendants' railway may be made are read as following, and not interenacting the enacting clauses. The section, then, with the transposition of words suggested, would, after setting forth the preamble, run thus:—

"Be it therefore enacted, that nothing herein contained shall extend to prevent the owner or owners, lessee or lessees, occupier or occupiers, for the time being of any lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coals and other mines, minerals or quarries lying near or adjoining the said railway and in parts adjacent, at any future time or times, and from time to time hereafter, as occasion shall be and require, from taking any railway, tram or other roads, ways, approaches or watercourses across the said railway hereby authorized to be made, and from using (here the words 'from using' must, I think, be read for the words 'to use') such railway, tram, roads or other roads, ways, approaches and water courses, for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such a way and for such purpose as they or any of them may require; and the said company shall not be entitled to demand, have or receive any tonnage or compensation whatsoever for

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the making of such way or the passing of any goods, persons, horses, carts and carriages, mines, minerals, goods, merchandise or other matters and things along any such railway, tram, road, way or approach, or compensation for any watercourse so to be made across the said line of railway hereby authorized to be made :” but so, here would come in the conditions which in effect are, that the crossing railway, &c., be in every instance taken above or below such line of railway (that is, not made on the level), and so that it do no injury to and do not prevent the free passage over, upon and along the said railway thereby directed to be made, and so that all the works of the crossing, railway, &c. be done under the superintendence and according to plans approved of and to the satisfaction of the company and their engineer.

The section so read may be divided into three parts ; viz., first, the two recitals contained in the preamble ; secondly, the two enactments, the one beginning with the words, “ Be it therefore enacted,” &c. ; the other, being the last member of the 234th section, beginning with the words, “ And the said company shall not be entitled to,” &c. ; and thirdly, the conditions subject to which any crossing, railway, &c. must be made.


For the purpose of the present case, it is to be taken that the conditions lastly referred to have been or will be complied with. The case then depends upon the construction of the preamble and the two enacting clauses, and the question that arises is, what is the nature and extent of the right which, by the 234th section, is conferred on the owners of the lands, tenements, &c. lying near to or adjoining the said railway and on the owners, &c. of coal and other mines, minerals, or quarries lying in parts adjacent.

It does not appear to me that it will much assist in the elucidation of this question to consider whether the right conferred by the 234th section, whatever that right may be, is to be regarded as an easement in or over the Defendants' land or railway, conferred by the legislature by consent of the Defendants, and as if by grant to the owners of such lands or mines; or whether it is to be considered as an exception out of the reservation from what otherwise and under the acts of parliament would have been purchased by and conveyed to the Defendants' company. Certainly, it does not seem to me that it would elucidate the question much to consider these points with a view to applying to them rules somewhat technical and subtle in their nature, and such as properly obtain in the construction of deeds. It appears to me, that the section must be looked at as a contract or bargain between the Defendants and the owners of the lands, mines, &c., made with the legislature, and that in construing it, the intention of the parties and of the legislature must be gathered as far as possible from the whole of the language used.

I do not say that it is possible, certainly it is not easy, to give full grammatical effect to every word used, but an endeavour should be made to give a meaning to the intention of the legislature after a consideration of every part of the section.

But the contract, though it may not be easy to construe it by reference to technical rules applicable to deeds, is a contract found on an act of parliament, and no well established rule of construction that has been approved of and acted upon in the construction of acts of parliament should be disregarded.

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Looking to the preamble alone, I infer that what was intended to be done was to preserve to the owners, &c. of the lands and mines, &c. such natural advantages of position, as regards the estuary and channel, as but for the construction of the Defendants' railway, the owners of land, &c. would or might have continued to enjoy, but of which, without protection from the legislature, they would be deprived by the formation of the Defendants' railway.

It is, however, a well-established rule that effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble, that is, that where the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble; *Crespigny v. Wetternoom* (a); *Lees v. Summersgill*, per Sir William Grant (b).

If, then, the words of the enacting clauses, taken together, are words admitting, according to their natural import, but of one meaning, they must prevail, notwithstanding an argument to the contrary, otherwise derivable from the preamble.

If, on the other hand, the words are not so clear and explicit as to admit of but one clear and distinct meaning, but reasonable effect may be given to the words used in the enacting clauses by applying to them another meaning, then I apprehend that the preamble may be looked to to throw light upon the subject; *Mason v. Armitage* (c); see also the authorities collected in *Davidson on Statutes* (d). We ought then, I think,

(a) 4 T. R. 793.


(c) 13 Ves. 36.


(b) 17 Ves. 11.

(d) Pages 655—658.

to inquire whether the plain obvious meaning of the words in the enacting clause or clauses is necessarily such as to give to the owners of lands, mines, &c. a right to use a railway, &c. crossing the Defendants' railway for all lawful purposes, or whether the enacting clauses may not, without rejecting or doing violence to any of the language used in those clauses, be reasonably satisfied by holding them to give a right to use the crossing railway for such purposes only as may be required or convenient, or advantageous for the use and enjoyment of the land and the working of the mines and quarries, so as to admit of the words in the enacting clause being interpreted by the language of the preamble.

This question is one of some difficulty, and on which, in the course of the argument and since my opinion has fluctuated, I have had the advantage of reading and considering the opinion at which, but not without much doubt and hesitation, my Brother *Willes* has arrived,—and I distrust very much the correctness of my own opinion when it at all conflicts with his. Upon the best consideration however that I can give to the subject, I am of opinion that the words of the enacting clauses are not so clear and unambiguous as to exclude the application of the preamble, that they may and ought to be read with the recitals in the preamble, and that, construed and interpreted by the aid of such recitals, the proper construction of the whole section is, that the right given to the landowners is limited to a user by them, and those to whom they may give leave, for such purposes and for all such purposes as may be reasonably required for the beneficial and convenient use and enjoyment of the lands, or for the profitable or convenient working of the mines or quarries, &c.

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The right to *make* the crossing railway, &c., is given to a defined class, viz., to owners, lessees or occupiers of land, &c. The right to *use* the crossing railway at all is a right conferred for the benefit of the owners, lessees and occupiers, and of all and every other person and persons to whom they or any of them may from time to time give leave; the *use in fact* that is authorized to be made is a use in such way and for such purpose as they or any of them may require.


I read the last-mentioned words "they or any of them may require" (to be found in the last line but one, and in the last line in page 2908 of the printed copy of the act), as indicating as regards persons, the same persons as are meant to be designated by the words "they or any of them" in the last line but two of the same page, viz., the persons who may from time to time give leave: so that whilst the right to use the railway is as regards *persons* extended beyond the class previously denoted, viz., owners, lessees and occupiers, and will include a person or persons to whom they the owners, lessees or occupiers or any of them may give leave, the *purpose* is limited, viz., to a use in such a way as they the owners, lessees or occupiers *or any of them* may require. It is to be observed that the section does not in terms provide for a use by servants, agents, workmen, &c.


The word "occupiers" might indeed include farm and other servants, workmen, working and residing on the lands, or residing on lands adjacent to the mines or quarries. It would not, or at least not aptly, include many other persons, workmen, customers of the mines or quarries residing at a distance, to whom it might be important to the owners, lessees or occupiers, to have the power to give leave to use the railway, using it for

purposes which they the owners, lessees or occupiers of the lands, &c., as such owners, lessees or occupiers might for convenience or advantage require. If I am right in construing the words "way and purposes" not as meaning such way and purposes as the persons to whom leave is given may choose to require, but as meaning way and purposes, such as the owners, lessees or occupiers may require, then I think the way and purposes must be such and such only as they the owners, lessees or occupiers *may as such* owners, lessees or occupiers reasonably require.

I think that it was to meet such a case as last supposed, that the words "person or persons to whom they or any of them may from time to time give leave" must be taken to have been introduced, and that the words "for the *benefit* of themselves and of the persons to whom leave may be given" do not seriously interfere with this view. If the word "and" in the last line but one in page 2908 can be rejected, the meaning of the section on the whole would be reasonably clear.

The company are no doubt in terms prohibited from receiving any toll or compensation for any use of the crossing railway made at the expense of other parties over or under the line of the Defendants' railway, but it does not follow from this that the contract (for such I take it to be) was a contract to allow the owners of land, &c. to licence all persons to use the crossing railway wholly irrespective and independent of any object or purpose that may be required by the owners of the lands, &c. as such owners. Upon the whole, I think the right is limited to a use by the owners, lessees and occupiers themselves, and of persons to whom they or any of them may give leave to use the crossing, in a way and

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for a purpose which they, the owners, lessees or occupiers, *or any of them*, as such owners, lessees or occupiers, may with relation to their lands, mines, quarries, &c., require for the full and complete use and enjoyment of their land and properties, but no further.

I much regret to find that a difference exists between my learned Brother *Willes* and myself. It is, however, satisfactory to me to know, that it is not a difference which arises upon any important rule of interpretation to be adopted in the construction of an act of parliament; but from the difficulty of applying rules, in the correctness of which I think we both agree, to the interpretation of this 234th section, a section not carefully or grammatically worded, and on which it is very difficult to come to a conclusion free from all doubt.

Mr. Justice WILLES.


Judgment of
Mr. Justice
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If I understand the question, it is whether *Mr. Hughes*, the Plaintiff, would have a right to use a railway constructed across the Defendants' railway, in conformity with the 234th section of the act, for all lawful purposes to which a railway could in fact be applied, or whether he would only be entitled to use it for purposes connected with the more beneficial use of his own lands or those of others whom he might authorize, such lands lying adjacent to the estuary, which the line of the Defendants' railways skirts, and the free communication with which is intercepted thereby, and not otherwise limited.

The answer to this question depends upon the construction of the 234th section itself as to which I have entertained doubts.

Reading the principal enactment by the light of the

recital alone, I might have thought that the section was framed with the single view to preserve those advantages, which the owners and occupiers of the lands as such could enjoy, and those only; and that the crossing railway when made was to be used for the same, as a way made appurtenant to the lands by private grants.

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On the other hand, reading the principal enactment by the last member of the section, "that the company shall not be entitled to demand, have or receive any tonnage or compensation *whatever* for the making of such way, or the passing of any goods, persons, horses, carts and carriages, mines, minerals, goods, merchandise or other matters and things along any such railway, &c." I should have inferred that the free use of the crossing railway for all purposes for which a railway could be used was allowed, because all sorts of traffic are here enumerated, and in no case is any charge to be made by the Defendants' company, in no case is any compensation to be paid to them for the use of any sort of traffic upon the crossing railway; in no case, therefore, is it contemplated that there can be a use of it as a railway which shall give them a cause of complaint.

The main body of the section is to the effect that nothing in the act, and of consequence nothing that may be done under the act, shall extend to prevent the owner, &c., of any lands, &c., lying near to or adjoining the said railway, and in parts adjacent, and at any time and from time to time as occasion may be or require, from making any railway, &c. across the Defendants' railway, so that such crossing railways be carried above or below the Defendants' line of railway. Then follow in the section the words upon which the question turns, a grammatical construction of which seems to me im-

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possible, but from which an answer to the question in the suit must be made out. Those words are "and to use" (meaning it should seem "nor to prevent them from using) such railways, &c." for the benefit of themselves, and of all and every other person or persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require, so that any such railway, &c., do no injury to and do not prevent the free passage over, upon and along the said railway of the Defendants, and so that the construction of the crossing railway be under the superintendence and to the satisfaction of the Defendants' engineer.

In the construction of these words I have found some difficulty. At first I thought that the general words, "any and every other person or persons, and as they or any of them may require," might be understood as applicable to the persons who though not owners or occupiers of land adjoining the railway were "such in parts adjacent," so that their lands had practically suffered or could practically suffer depreciation by being cut off from the estuary, and to purposes connected with the use of such lands. Upon consideration, however, I have come to the conclusion that there is nothing either in the recital or in the expression to which I have referred, sufficient to cut down the effect of the words "for the benefit of themselves and of all and every other person or persons to whom they give leave, and in such way and for such purposes as they or any of them may require;" which words seem so general as to require the construction insisted upon by the Plaintiff, which construction finally I adopt.

In my opinion the Plaintiff will be entitled to use the

railway, if and when made in conformity with the 234 section, for all lawful purposes whatever.

The VICE-CHANCELLOR.

The question between the Plaintiff and the Defendants, the railway company, is this :—whether the right given by the *Chester and Holyhead* railway act to the owners, lessees and occupiers of lands adjacent to the Defendants' railway to make and use railways, does or does not entitle the persons to whom that right is given to use any such railway as a public railway, i.e. for the purpose of carrying passengers and goods for tolls or fares in the manner of ordinary railway carriers.

The question turns on the 234th section. I have examined all the other numerous sections of the act, and it does not appear to me that any of them afford any aid (at least any material aid) towards the construction of the 234th.

That the endeavour to put a right construction on this section is attended with much difficulty and doubt, is sufficiently apparent from the fact that the two learned Judges who have favored the Court with their assistance on this occasion, entertained different opinions. I confess that I feel some doubt with respect to the question at issue, but upon the whole my opinion is in favor of the construction contended for by the Defendants.

The 234th section consists of two branches or clauses, the one, the preamble, which introduces the enactment, and the other the enactment itself, consequential on that preamble.

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I assent to the proposition that if there be in an act of parliament a clear, explicit, positive enactment, its operation and effect are not to be cut down and restricted, by the more limited tenor and scope of the preamble. But if the terms in which the enactment is expressed, are such as to raise serious doubt as to its true intent and meaning, it is quite legitimate and proper to resort to the preamble for the resolution of that doubt, and to put such construction upon the enactment as will accord with the preamble.

First, then, I will consider the enactment apart from the preamble. The grammatical inaccuracy of the sentence has been already referred to. The structure of the sentence as it stands is this:—that nothing herein contained shall prevent the owners, lessees or occupiers of lands, &c. near the company's railway from making railways, roads, &c. across the company's railway, and to use such railway, roads, &c. for the benefit of themselves and others to whom they may give leave. So that the preposition "from" first governs the participle "making" (which is quite right), and then it is made to govern the infinitive "to use" (which of course is quite wrong). The inaccuracy consists in the verb "to use" being put in the infinitive instead of being put as the participle "using." And I apprehend the proper way to correct the error and make it English is to substitute the participle "using" for the infinitive "to use;" and then the structure of the sentence will be this:—that nothing herein contained shall prevent the owners, &c. of lands near the company's railway from making railways, roads, &c. across the company's railway, and *using* such railways, roads, &c. for the benefit of themselves and others. The repetition of the preposition "from"

before the word "using" is unnecessary, and of course not a single word should be introduced which is not absolutely necessary.

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The first thing that strikes one on reading this enacting clause is, that the power to make railways across the company's railway is given, not to the world at large nor even to the inhabitants of the neighbourhood in general, but only to a limited class of persons, namely, the owners, lessees or occupiers of lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal or other mines, minerals or quarries lying near to or adjoining the company's railway and in parts adjacent. The inference to be drawn from this circumstance appears to me to be this, that the purpose which the legislature had in contemplation as that for which such railways were authorized to be made was, a purpose peculiar to the owners, lessees or occupiers of lands, &c., lying near to the company's railway. The purpose contemplated by the legislature must apparently have been a purpose which no one was likely to entertain unless he was an owner, lessee or occupier of lands, &c., lying near to the company's railway. Now the purpose of making a railway from one point to another in *North Wales*, crossing the company's railway, in order to become railway carriers, and make a profit by carrying passengers and goods, charging certain rates of fare or toll, is a purpose which any of the queen's subjects might entertain, whether they were or were not owners, lessees or occupiers of lands or property in the immediate neighbourhood. It is true that no one who was not armed with the compulsory powers given by the legislature in railway acts could make a railway at all, unless he was the owner, lessee or occupier of the lands through or over which it was to pass, or had obtained the permission


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of such owners, lessees or occupiers. Still, if a person or body of persons could obtain such permission, there would be nothing to prevent their making a railway and using it for any lawful purpose; but even if they obtained such permission, they could not make their railway across the company's railway, for the right to make such railway across the company's railway is given only to the owners, lessees or occupiers themselves, and not to any person or persons who might obtain their permission. Therefore, from the circumstance that the right to make railways across the company's railway is by this enactment conferred only on the owners, lessees or occupiers of lands, &c. near to the company's railway, I draw this inference—that what the legislature had in contemplation in giving such right was, that such railways might be made, not for the purpose of carrying passengers and goods at a rate of fare or toll, and in that manner deriving a profit therefrom, but for a purpose specifically connected with the benefit and advantage of the lands, &c. lying near to the company's railway. At the same time I admit, that whatever may have been the particular purpose which the legislature had in view, it would not necessarily follow that all other purposes were intended to be excluded.

Proceeding then to the next branch of the enacting clause, I find that the legislature has thought proper to specify the use to which such railways were to be applied, and here this question naturally arises—If the legislature intended that such railways might be used for all purposes whatsoever, why introduce any provision at all with respect to the user of them? I assent to the proposition insisted upon by the learned counsel for the Plaintiff, that if a man makes a railway over his own land, he does not require any authority from the legisla-

ture to use such railway for any lawful purpose whatsoever, and that he may without any such authority run locomotive engines and carriages and trucks upon his railway, and carry passengers and goods, charging fares or tolls at his pleasure, subject of course to the superintending authority of the Board of Trade.

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And if the legislature gives to any person making a railway over his own land the right to carry such railway across the company's railway, still he would require no authority from the legislature to use such railway for any lawful purpose, as he might think fit. The introduction therefore of a provision respecting the purpose for which the railways were to be used, would seem to be quite unnecessary, if it was the intention of the legislature that such railways might be used for all lawful purposes whatever. It would indeed be necessary to introduce some provision as to user, if it was intended to *restrict* the right of user, but it would be quite unnecessary for the purpose of *creating* the right of user. Or, if we may suppose that the legislature intending the makers of the railways to have an unrestricted right to use their railways as they pleased, should think fit to introduce (however unnecessarily) a provision respecting the use, we should expect to find that provision expressed in short and simple and distinct terms, and the enacting clause would run in some such form as this: "Be it enacted that nothing herein contained shall prevent the owners, lessees or occupiers of any lands, &c., lying near to the company's railway from making any railways across the company's railway, and using such railways for any lawful purpose whatever." Instead of any such form as that, the branch of the clause which relates to the use of the railways is expressed in these terms:—"And to use (or correcting the grammatical error), and using

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such railway, tram roads or other roads, ways, approaches and watercourses for the benefit of themselves and of all and every other person or persons, or to whom they or any of them may from time to time give leave, and for such purposes as they or any of them may require." Now, it appears to me that this elaborate and somewhat cumbersome language can hardly have been intended to express the idea that the makers of the railways should use them for all lawful purposes whatever. There is a speciality about it which seems to me at variance with the supposition that an unrestricted user was intended. The makers of the railways are first authorized to use them for the benefit of themselves.—How strange that the makers and owners of the railways over their own land, but crossing the company's railway, if they were intended to have their right to use them for all purposes without restriction, should be in terms authorized to use them for their own benefit? In this aspect the authority appears to me (I confess) nothing less than irrational. But if we recollect that the persons to whom the authority is thus given to use their own railways for the benefit of themselves, are the owners, lessees and occupiers of lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal, and other mines, minerals or quarries lying near to the company's railway, the giving the right to use them for their own benefit becomes perfectly rational, on the supposition that the intention was to give the right to use such railways, not for all purposes whatsoever, but for all purposes necessary to enable those persons to derive the utmost profit and benefit from those lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal and other mines, minerals and quarries. If we regard the clause as intended to give a restricted right of user, it is intelligible

and reasonable; but if we regard it as intended to give an unrestricted right of user, I cannot help thinking that the giving to the makers of the railways the right to use them for the benefit of themselves, is simply absurd.

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The clause then proceeds to give to the makers of the railways, in addition to the right to use them for the benefit of themselves, the right to use them for the benefit of certain other persons. It runs thus, "and to use such railways, &c. for the benefit of themselves, and of all and every other person and persons to whom they or any of them may from time to time give leave." Give leave to do what? To *make* any such railway: clearly not. The right to make a railway across the company's railway is by the preceding part of the enacting clause (as I have already observed) confined to those who are actually owners, lessees or occupiers of certain lands, &c.; no person, not even himself, an owner, lessee or occupier of some of the lands, &c. specified in the preceding part of the clause, could make such a railway across the company's railway, even though he obtained permission to do so from the owners, lessees or occupiers. The leave therefore here spoken of must mean leave to use the railway when made. If so, who are meant by the words "all and every person and persons to whom they or any of them may from time to time give leave," that is, "that is leave to use the railway." Was it intended by this language to describe general passengers, who on payment of a fare were to be conveyed in the carriages of the owners of the railway in the same manner as passengers are conveyed on any of our public railways. If the legislature intended to give the right to carry passengers in general, on payment of fares, would they express that meaning by saying that the maker of the railway may use it for the benefit of himself and of all and

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every other person and persons to whom he may from time to time give leave. Such language would be, to say the least, most unnatural and inappropriate to express such an intention. I conceive that the Court ought not to put upon the language of the clause an interpretation which renders it inappropriate and absurd if it is capable of another construction which makes it appropriate and reasonable, and consistent with the whole tenor of the context. And it appears to me that the language is capable of more than one other construction which has that effect. It may have been intended to refer to the agents, clerks, workmen and others in the employment of the owners, lessees or occupiers and their customers going to and upon the places where their business might be carried on, or it may have been intended to confer on the maker of a railway crossing the company's railway, not only the right to use his own railway for the benefit of himself, having regard to the exigencies of his own lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal, and other mines, minerals or quarries, but also to contract with others having similar need, to give them leave to use such railway in like manner as he might use it himself. This construction seems to me to be the most natural and probable construction, and by adopting this construction the language is rendered appropriate and just.

The clause then proceeds thus: "And in such way and for such purposes as they or any of them may require." It is upon these words that the counsel for the Plaintiff lay the most stress, as expressing the intention of the legislature to give an unrestricted right of user. Now I cannot help thinking that if such was the intention, it would be a very strange method of carrying

it into effect to give to the maker of the railway, first a right to use it for his own benefit, of those to whom he might give leave, and then a right to use it for any purpose whatsoever, instead of shortly and simply giving him the right to use it for any purpose whatsoever. But further, it will be observed, that the language is not "as they or any of them may think fit," but "as they or any of them may *require*." That word "*require*" appears to me special and significant; it is true that the word "*require*" is sometimes used to signify merely *desire*. But that is not its most proper meaning. In its proper meaning, it points to something that is needed—something that is requisite. And in that sense it is here used most appropriately when we recollect who are the persons with respect to whom the word is used, namely, the owners, lessees or occupiers of lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal and other mines, minerals or quarries lying near to the company's railway. When, therefore, the right is given to such owners, lessees and occupiers (and to them only) to make railways across the company's railway and to use them in such way and for such purposes as they may require, I think the fair inference is, that the legislature intended to refer to those purposes which were requisite for the more beneficial and profitable use and enjoyment of those lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal and other mines, minerals or quarries of which the persons to whom the right is given are the owners, lessees or occupiers. It is contended, however, that if such be the right view of this part of the sentence, the word "and," which introduces it, should have been omitted. To a question of criticism the observation is, perhaps, just, though I do not think that the introduction of the word "and" is absolutely and

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grossly inappropriate. And on the other hand, if the Plaintiff's view be adopted, the same critical accuracy would then require the introduction of the word "other," so as to make the sentence run thus: "to use such railways for the benefit of themselves and of the persons to whom they may give leave, and in such other way and for such other purposes as they may require." At all events, the use of the word "and" is, at the most, a verbal inaccuracy, and I do not think it is of such weight that in order to avoid it the Court should adopt a construction which involves the necessity of supposing that the legislature, intending the makers of the railways to have an unrestricted right of using them for any purpose whatever, would express that intention in so absurd a manner as to give them the right to use such railways first for their own benefit, then for the benefit of the persons to whom they might give leave, and then for all purposes whatever.

For these reasons, I am of opinion that (to say the least) the most probable construction of that part of the enacting clause which relates to user, is to hold that the right of user thereby given was intended to be only a restricted and not a general and unlimited right of user.

But it may be said, supposing that to be so, the specifying a particular mode of user would not exclude any other mode of user in the absence of express words of prohibition. To this I answer, that, in my opinion, the right of making the railways and the right of using, are by this enacting clause connected, or rather the whole is one single right. In the absence of this clause, the Plaintiff and other owners, lessees and occupiers of the land and other property referred to would have no right at all to make a railway across the

company's railway. The clause enacts that nothing in the act contained shall prevent them from making railways across the company's railway, and using such railways for the purposes specified. They can have no right with respect to railways crossing the company's railway beyond that which is expressly given them by this clause. And I think that the specification of particular purposes excludes all purposes not specified. The subsequent part of the enacting clause does not seem to me to affect the question one way or the other. The passage by which the company is precluded from demanding any tonnage or compensation for the making of the railway or the passing of any goods, persons, horses, carts, carriages, mines, minerals, goods, merchandize or other matters and things along such railway, road, &c. seems to me quite consistent with either construction. Whether the right of user was intended to be restricted or unrestricted, there would equally be goods, persons, horses, carts, &c. passing along the railway, road, &c. And the object of this part of the clause was to prevent the company demanding any compensation on the ground of the railway crossing the company's railway.

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I have hitherto considered the enacting clause without the slightest reference to the preamble. But when I turn to that preamble, it appears to me to afford strong corroboration of the view I take of the enactment. The preamble is this:—[His Honor referred to the recital, p. 526, and proceeded.]

A glance at the plan, which has been verified, makes this statement as to the situation of the lands and the company's railway perfectly clear. By the lands on the banks of the estuary of the *Dee* and *St. George's*

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Channel, is meant that long strip or tract of land which lies along the north coast of *Wales*, of indefinite width through or over which the company's railway was by the act intended to run and now runs, at a distance from the water, varying in different parts, but never at any great distance therefrom, and sometimes close to the margin of the water.

The preamble recites that those lands abound with coal and other minerals and with stones suitable for quarries, and also are well situated for the erection of works and manufactories, and for other purposes of commerce. And it also recites that the line of the company's railway would have the effect of obstructing the free intercourse and traffic between *those lands* and the sea, and so depriving *such lands* of the natural advantages of position as respects the said estuary and Channel. The advantages of position here spoken of are obviously such as would arise from the proximity of the sea, as affording water-carriage for the export of the products of those lands and for the import of articles of agriculture or manufacture which might be wanted for those lands and for the works and factories that might be erected or established there. The only mischief or inconvenience noticed in this preamble, and therefore the only mischief which was intended to be cured or prevented by the enactment which follows, was that which the construction of the company's railway would occasion to *those lands* thus described as abounding with coal and other minerals and stones, and as being well situated for the erection of works and manufactories and for other purposes of commerce. The sole object in view was to preserve to those lands their natural advantages of position with respect to the sea. There is no intention to give any right or benefit to the persons

in whose favor the enactment is made, except in relation to those lands. And the preamble having thus stated the mischief or inconvenience which it was intended to remedy or prevent, concludes by reciting that it is desirable to give facilities of access between the said lands and the sea, and from the sea and the lands, and on the lower or sea-side of the company's railway to parts inland, the words, "parts inland" obviously meaning those parts of the said lands which would lie on that side of the company's railway which was furthest from the sea. And then follows the enactment, which is introduced by the words, "Be it therefore enacted." Therefore, that is for the reason before mentioned in the preamble, and for none other, the enactment is made solely for the purpose of remedying or preventing the mischief pointed out by the preamble; and, unless the enactment clearly and explicitly confers a right more extensive than is necessary for that purpose, its construction must, in my opinion, be governed by the preamble. So far from that being the case, I think, for the reasons I have already stated, the effect of the enactment is the other way. At least it is doubtful and that is sufficient.

Upon the whole, I am of opinion (though I cannot say my mind is free from all doubt), that the Plaintiff is not entitled to use his railway to carry passengers and goods as a public carrier, charging fares or tolls.

Such being the conclusion of the Court on the construction of the act, what decree ought now to be made? When the case came before the Lords Justices, on the motion for an injunction to restrain the company from preventing the Plaintiff from making his railway across the company's railway, their Lordships, abstaining from

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expressing any opinion on the construction of the act, considered that the Plaintiff had a right to make a railway, and that the question as to the purposes for which he was entitled to use it should be determined at the hearing of the cause. They therefore granted the injunction on the terms of the Plaintiff undertaking to abide by such order as the Court might think fit to make, as to the purposes for which he had the right to use it. Of course my object is, and ought to be, to make such a decree as to carry into effect the views of the Lords Justices. And to this, and to the decree of the Court, will be to the following effect :—

Declare that the Plaintiff is entitled to make a railway across the line of the *Chester and Holyhead Railway*, between the lands of the Plaintiff on the higher or inland side of the said *Chester and Holyhead Railway* and the sea, and between the lands of the Plaintiff on the lower or sea side of the said *Chester and Holyhead Railway* and the said lands on the higher or inland side of the same railway, so that such railway made, or to be made, by the Plaintiff do no injury to and do not prevent the free passage over, upon and along the said *Chester and Holyhead Railway*, and so that all the works connected with the passing thereof over or under the said *Chester and Holyhead Railway* be done under the superintendence and to the satisfaction of the engineer for the time being of the *Chester and Holyhead Railway Company*, and according to plans to be approved by him. But that the Plaintiff is not entitled to use such railway so made, or to be made by him, for the purpose of conveying or carrying passengers or goods as a public carrier, charging fares and tolls.

Let the injunction be made perpetual. No costs.

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MOTION for a decree.

The suit was instituted to restrain the Defendant by injunction from interfering with the Plaintiff's ancient lights.

It appeared, that by an indenture of lease dated in June, 1845, Earl *Fitzhardinge*, in consideration of the costs and charges which the Plaintiff Sir *David Davies* had incurred in repairing and improving the messuage and buildings erected on the piece of land thereby demised, and in consideration of the rents and covenants therein contained, demised to the Plaintiff a piece of ground with the buildings thereon, being No. 2, *Berkeley Street*, adjoining the *Gloucester Coffee House* in *Piccadilly*, together with all the ancient lights and areas and appurtenances to the same, except a certain cellar, for twenty-nine years.

For many years before the granting of this lease, the house No. 2, *Berkeley Street*, had ancient windows on the east and south sides, and particularly two on the ground and first floor. In contemplation of the lease above stated, the Plaintiff under an agreement with Earl *Fitzhardinge* had expended considerable sums of money in repairs, &c., and among other improvements had opened two additional windows on the east side.

If a person having ancient lights, which he is entitled to have protected, puts in new lights on the same side of the building, he has no right to any protection in respect of such new lights, and the owner of the contiguous premises may build up any structure obstructing the light to such new lights, even though in so doing he necessarily interferes with the ancient lights.

Betts v. Clifford (1 John. & Hem. 74) commented on.

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Ancient Lights.

Where a landlord, who had granted a lease of certain premises, including ancient lights and appurtenances, to A., in consideration of certain improvements which had been made by A. in the premises leased (which improvements included new lights), granted a lease of the adjoining premises to B., and B. was building so as to block up the lights of A.

Upon bill by A. for injunction, *Held*, that the landlord could not have blocked up such lights, and that his lessee B. could stand in no better position, and the Court granted

an injunction as against B.

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Earl *Fitzhardinge* was also the owner of the adjoining land on which the *Gloucester Coffee House* stood.

Earl *Fitzhardinge* having died, Sir *Maurice Berkeley*, under his will, became entitled to the reversion in the pieces of land on which the Plaintiff's house and the *Gloucester Coffee House* stood, and in 1859, a former lease of the *Gloucester Coffee House* having been surrendered to him, Sir *Maurice Berkeley* granted a new lease of those premises to the Defendant *Mary Marshall*, in consideration of her rebuilding the *Gloucester Coffee House*. Accordingly, the Defendant pulled down the old buildings, which at the date of the lease to the Plaintiff in 1845, were low and did not interfere with the Plaintiff's lights, and was proceeding to build up new and higher buildings, which the Plaintiff alleged would seriously interfere with his ancient lights, and he accordingly filed his bill to restrain the Defendant from proceeding with such buildings.

Mr. *Baily* and Mr. *Freeling* for the Plaintiffs; Mr. *Greene* and Mr. *C. Hall* for Defendants.

The following cases were cited:—*Gordon v. Cheltenham Railway Company* (a); *Patching v. Dubbins* (b); *Bacon v. Jones* (c); *The Rochdale Canal Company v. King* (d); *Betts v. Clifford* (e).

The VICE-CHANCELLOR (without calling for a reply, said):—

Notwithstanding the able arguments for the Defendant, I think that justice requires that the injunction which Plaintiff now asks for should be granted.

(a) 5 Beav. 229.

(b) *Kay*, 1.

(c) 1 Beav. 389; 4 My. &

Cr. 433.

(d) 2 Sim. N. S. 78.

(e) 1 Johns. & H. 74.

For the Defendant it is contended in the first place, that the Plaintiff has disentitled himself to any relief by acquiescence, that he has stood by and knowing what the Defendant was from time to time doing, has, by remaining passive, encouraged the Defendant to continue the building in question at great expense; and that therefore it would be contrary to equity that afterwards he should come to this Court and ask it to interfere, and order the Defendant to pull down what has been already erected.

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Now, without going through the details of the evidence, but referring to it generally, it appears to me that there is no case of acquiescence at all. It appears to me that there is not even such acquiescence as would disentitle a Plaintiff coming here upon an *ex parte* application, certainly not such an acquiescence as would disentitle him coming here upon notice. Mr. *Munt*, the surveyor and superintendent of the Defendant's buildings, endeavours to establish acquiescence in this way. He says he came some time ago and communicated with the Plaintiff, not on the subject of what he was doing in the way of interfering with the ancient lights, but on some subject connected with the party wall or a stack of chimneys, a question quite irrespective of the question of interfering with ancient lights or doing any thing which would be a serious inconvenience to the comfort of the Plaintiff's house. Mr. *Munt* says that he then told the Plaintiff, with respect to the projecting window on the second floor, which is one of the ancient lights, that inasmuch as that projected over the Defendant's premises it was a trespass, and that he might consider it his duty to his employer to cause proceedings to be taken for the purpose of preventing that trespass, and procuring that projection to be removed;

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but he said he was not desirous of doing that; in fact what took place, took place upon the representation of Mr. *Munt*, that the Plaintiff had no right to have the window there at all; and in the discussion which took place the Plaintiff was misled by the scientific gentleman employed by the Defendant as to his right to have that window there; but the discussion did not relate to the question whether anything which the Defendant was doing would be injurious to the Plaintiff by intercepting his light. Mr. *Munt* says he did not point out or give an explanation as to what the Defendant was about doing. It does not appear that any plans or elevations were produced, or that the Plaintiff could, from Mr. *Munt's* statement, be aware of what the Defendant was intending to do. Looking at the other affidavits it appears to me that there is no ground for saying that the Plaintiff has acquiesced, and thereby deprived himself of his right to relief. I do not in the smallest degree question the principle laid down in the *Rochdale Canal Company v. King (a)*, and the other cases cited by the Defendant's counsel on the subject of acquiescence. I must, however, observe with respect to *Betts v. Clifford (b)*, I am satisfied that the Vice-Chancellor, whose decision is there reported, must have been misunderstood in the passage referred to; because as that passage stands it would seem to amount to a dictum to this effect, that it is now settled by *Bacon v. Jones*, that a party filing a bill for an injunction will never, under any circumstances, succeed in obtaining it at the hearing, unless he has applied for it by interlocutory application. I am satisfied the Vice-Chancellor never intended to lay down any such general proposition. What his Honor meant to lay down was that the

(a) 2 Sim. N. S. 78.

(b) 1 John. & H. 74.

Plaintiff is bound to bring on the contest on the earliest opportunity possible. It may have been that he expressed himself in general terms, but only intending his observations to apply *quoad hoc*, with reference to the circumstances of the case to which he referred; and then it was assumed that he meant to lay down that as an universal proposition, which I am satisfied he never meant to do.

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It is further contended by the Defendant that new and additional lights have been put in by the Plaintiff. According to the Plaintiff's own statement, he has, within a period of twenty years, made some new windows which did not exist previously to the year 1845. That is the fact, and no doubt it is a well established principle that if a party, having ancient lights which he is entitled to have protected, puts in new windows on the same side of his building, he has no right to have those new lights treated as ancient lights, or to have any protection in respect of them; and a person who has contiguous land has the right to build up any structure which will have the effect of obstructing the access of light to those new lights, even though in so doing he necessarily interferes with the ancient lights; and that for the best of all reasons, because otherwise the party making those new lights would in the lapse of time have acquired a right, which he never possessed before, to have these new lights treated as ancient lights. The person against whom the easement is claimed in respect to the ancient lights has a right to say that at all events no new easement shall be acquired against him; and therefore having the right to raise any structure in order to block up the new lights, if he cannot do so without also interfering with the ancient lights, he cannot be prevented.

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But the right of the Plaintiff in respect of these lights does not stand upon the footing of ancient lights simply. As to some of them, they are ancient lights; as to others the Plaintiff's case is this: it is true he constructed them within twenty years, and therefore he does not contend that they are ancient lights; but he made these new lights in addition to the ancient lights shortly previous to the time at which he got the new lease in 1845 from the late Lord *Fitzhardinge*, and part of the consideration for granting to him the new lease was his having laid out money for these improvements. Could Lord *Fitzhardinge* himself be entitled now to build up a wall on the contiguous ground within a few feet of one of these new lights so as materially to obstruct the access of light thereto? Clearly not. It is said, indeed, that in the new lease granted to the Plaintiff by Lord *Fitzhardinge* there is mention of ancient lights. That is perfectly true, but the language is "ancient lights and appurtenances." All the appurtenances which existed at the time when the lease was granted are as much the subject of the lease as the ancient lights, and Lord *Fitzhardinge* would not have been entitled to block up these new lights any more than he could have blocked up the ancient lights. And if Lord *Fitzhardinge* could not do so, neither can any person do so who derives title from him subsequently to the grant of the lease to the Plaintiff. Now Sir *Maurice Berkeley* derived his title under Lord *Fitzhardinge's* will, and the Defendant is the lessee of Sir *Maurice Berkeley*; and neither Sir *Maurice Berkeley* nor his lessee has a right to obstruct the Plaintiff's lights any more than Lord *Fitzhardinge* himself could have done.

But then it is said that at the time when the Plaintiff

took his lease there was an existing lease of the *Gloucester Coffee House* which had been granted to a person of the name of *Dale*, for a long term of years, and which had then become vested in the Defendant. And it is justly contended that Lord *Fitzhardinge* could not, as against the lessee of the *Gloucester Coffee House* under that previous lease, give a new right to the Plaintiff under the lease to him of 1845, although he could give such right as against himself or those claiming under him. No doubt if that old lease were still subsisting, the Defendant could not be restrained from doing what she is intending to do. But in 1859 the Defendant surrendered that old lease; that lease has ceased to exist, and a new lease has been granted to the Defendant. It is true the surrender of that old lease by the Defendant was part of the arrangement under which the new lease was granted to the Defendant by Sir *Maurice Berkeley*. Still, it appears to me that by the surrender of the old lease all the rights which existed under that old lease have as against this Plaintiff ceased to exist, and the Defendant must be regarded as a person deriving title as lessee by the lease or agreement for a lease granted to her subsequently to the lease granted to the Plaintiff. I think, therefore, that the Defendant has no right, upon the ground of some of the lights not being ancient lights, to do that which is intended to be done.

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DAVIES
v.
MARSHALL.
(No. 1.)

1861.
June 26, 28.

Costs.

Costs of preparing interrogatories, which were not used owing to admissions being put in, allowed as between party and party.

The 17th rule of 4th Consolidated Order, empowering the taxing master to consider whether he will allow an affidavit to be settled by counsel, does not take the question of the costs of the affidavit out of the discretion of the Court.

Costs of settling affidavit (which was an echo of the bill) by counsel, allowed.

Costs of drawing observations for counsel, when cause stood over, allowed.

Term fee allowed where the only proceeding was leaving copy of decree and bill of costs before taxing master.

DAVIES v. MARSHALL. (No. 2.)

THIS was a motion on behalf of the Defendants, that the taxation of costs might be referred back to the taxing master to be reviewed.

The suit was instituted for an injunction to restrain the obstruction by the Defendant of ancient lights. On the 1st February, 1861, the Court granted an injunction with costs to be paid to the Defendant, and such costs had been taxed at 159*l*. To this taxation the Defendant objected.

The items objected to are sufficiently stated in his Honor's judgment.

Mr. *Karslake* appeared for the Defendant in support of the motion; Mr. *Freeling* for the Plaintiff.

The VICE-CHANCELLOR.

The first objection is, that the master has allowed the costs of preparing interrogatories, intended for the examination of the Defendant, which were not used. As a general rule, if the Plaintiff's solicitor prepares interrogatories, and then, upon further reflection, concludes that it is unnecessary to use them, the Plaintiff is not entitled to have the costs of them allowed, as between party and party. But that was not the case here. The interrogatories were prepared by the solicitor, counsel having advised that it was necessary to procure

the Defendant's answer upon certain points. As to the question whether counsel gave sound advice, I can only say that in this case he could have given no other advice. I state that not because, as between a party and his own solicitors it is the duty of the Court to examine counsel's opinion, and say whether it was sound; the solicitor could do no otherwise than act upon it. In this case the advice was perfectly justified. The interrogatories were accordingly prepared, and would have been filed, but out of consideration for the Defendant, and to save expense to both parties, the Plaintiff's solicitor was afterwards advised by his counsel that if the Defendant would make admissions to the same effect, the Plaintiff need not incur the expense of filing these interrogatories, or put the Defendant to the expense and inconvenience of answering them; upon which the Plaintiff's solicitor sent that opinion to the Defendant's solicitor; and accordingly the Defendant's solicitor accepted the offer, and gave the required admissions. If I were to disallow this charge in any other similar case, the solicitor would at once file the interrogatories, and compel an answer without any consideration of the unnecessary expense and inconvenience which that course would occasion. It seems unreasonable for the Defendant to complain of having been saved not only his own costs but also those of the Plaintiff, which he would otherwise have had to bear. It appears to me that the master was justified in allowing this item.

The next item is, for counsel settling an affidavit. By the 17th rule of the 40th Consolidated Order the taxing master is empowered to consider whether he will allow the costs of an affidavit having been settled by counsel. If the effect of that order be to give the tax-

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 DAVIES
 v.
 MARSHALL.
 (No. 2.)

1861.

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MARSHALL.
(No. 2.)

ing master exclusive jurisdiction over this matter without any control of the Court, there can be no question about it. But I think that is not the meaning of the order, but that the allowance of the costs of settling the affidavit is subject to the control of the Court. The question therefore, is, whether this expense was properly incurred. The order does not use the word "special," as applied to the affidavit; and, moreover, this was the principal affidavit upon which the application was to be made for the injunction. It was said that this affidavit was a mere echo of the bill, but it does not therefore follow that it was not expedient to have it settled by counsel. Counsel might have thought it necessary to have more than that, and I must say that in the long run much expense would be saved to the suitors if affidavits, petitions and other documents were more generally settled by counsel. I think the item rightly allowed.

The next item is the charge "two fair copies for counsel 6s. 8d.," for a set of observations furnished to counsel at the hearing. The cause came into the day's paper in the sittings after Trinity Term, but was not reached, and kept its place until after the Long Vacation when it came on to be heard, and then stood over upon an undertaking by the Defendant not to continue to build, the object of the bill being to restrain her from building. Then the cause came on again to be heard, and in the meantime the Plaintiff's solicitor had furnished counsel with additional observations, the costs of which are objected to. Now until I have seen these observations, I cannot tell what they are or form any opinion as to their propriety. It might be quite right that the solicitor should submit a fresh set of observations in order that counsel might know what was the

existing state of things, but I cannot judge as to their propriety until I am furnished with a copy of them.

1861.

 DAVIES
 v.
 MARSHALL.
 (No. 2.)

The next item is the charge ("Two fair copies for counsel 13s. 4d.") for a second set of observations on a further hearing. It might be perfectly right that there should be such further observations, but I must see them.

[His Honor said he had seen the two set of observations and that he considered that they were proper and should be allowed.]

June 28.

The last item is the term fee for Trinity Term 1861. It appears to me, that according to rule the solicitor is entitled to charge a term fee for every term in which a proceeding by either party takes place. Here Easter Term intervened, and there is no charge for any term fee for that term, but there is a term fee charged for Trinity Term. The only proceeding in that term was the laying before the Taxing Master a copy of the decree and of the bill for taxation; and the question is, whether that is such a proceeding as according to the practice comes within the rule. There being no authority on the point, I must ascertain what the practice is in the Taxing Master's office.

[His Honor said he had consulted the Taxing Master, and found that the term fee was usually allowed in such a case.]

June 28.

The motion was refused with costs.

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May 1st.

*Legacy charged
on
Real Estate.
Vesting.*

PARKER v. HODGSON.

MOTION for a decree.

A testator gave a legacy upon the death of his granddaughter to her child or children, to be paid to such child or children at his, her or their respective ages of twenty-one years, and directed that the shares of such child or children as at the time of his granddaughter's death should be under the age of twenty-one years should bear interest at the rate of five per cent. and charged the legacy on his residuary real and personal estate, and the personal estate was deficient.

The granddaughter died, leaving one child, who afterwards died under twenty-one.


Held, that the legacy sank into, and was not raiseable out of, the testator's real estate.

The suit was instituted by the Plaintiff for the purpose of obtaining a declaration that a certain legacy of 400*l.* given by the will of *John Jennings* deceased to the child or children of his (the testator's) granddaughter *Mary Ann Parker*, in the events which had happened, was payable to the Plaintiff, and was payable out of the testator's real estate, the personalty being insufficient.

John Jennings, the testator in the cause, by his will, dated the 7th of January, 1835, after certain specific devises, proceeded as follows :—

“ I give and devise unto my son *John Jennings* and his assigns for his life the annuity or clear yearly sum of 32*l.* of lawful English money, to be paid to him in four quarterly payments in the year, and the first payment to begin and be made at the end of three calendar months next after my decease. And from and after the decease of my said son *John Jennings*, I give and devise unto my granddaughter *Mary Ann Button* and her assigns, the annuity or clear yearly sum of 20*l.* to be paid to her by four quarterly payments in the year, and the first payment thereof to begin and be made at the end of three calendar months next after the death of my said son. And I direct that the said last-mentioned

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PARKER
v.
HOBSON.

annuity shall be paid into the proper hands of the said *Mary Ann Button*, or otherwise as she shall appoint, and that her receipts shall be sufficient discharges for the same; and that the said annuity shall not be subject to the debts, control, disposition or engagements of her present or any future husband. And upon the death of my said granddaughter *Mary Ann Button*, I give and bequeath to her children the legacy or sum of 400*l.* to be shared and divided equally between and amongst them, in case there shall be more than one, and if but one, then to such only child, and to be paid to such child or children respectively at his, her or their respective ages of twenty-one years. And I order and direct that if any child or children of my said granddaughter shall happen to die before his, her or their share or shares of the said sum of 400*l.* shall become payable by virtue of this my will, then the share or shares of him, her or them so dying shall go and be paid to his, her and their surviving brothers and sisters, and to the executors and administrators of any brother or sister who shall have lived to attain the age of twenty-one years at such time as his, her or their original shares shall become payable. And I also order and direct that all and every the share and shares hereinbefore directed to survive and accrue shall from time to time survive and accrue together with the original share and shares, until such original share and shares shall by virtue of this my said will become payable. And that the share and shares of such of the children of my said granddaughter as at the time of her death shall be under the age of twenty-one years shall bear interest at the rate of 5*l.* per cent. per annum from her decease. And that such interest shall be paid and applied half-yearly for and towards the maintenance, education and benefit of

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such last-mentioned child and children, until their respective shares of the principal shall become payable."

The testator then gave and devised all his real estate not thereinbefore devised, and also all his personal estate whatsoever and wheresoever ("but subject to and charged with the payment of all my debts and funeral and testamentary expenses, and also subject to and charged with the annuities and legacy hereinbefore given") as to one moiety to his daughter *Jane Jennings*, her heirs, executors, administrators and assigns; and as to the said moiety to his daughter *Elizabeth Jennings* and her assigns during the term of her natural life, and upon her decease to his (the testator's) grandson *Richard C. Hodgson*, absolutely; and the testator appointed *Jane Jennings* and *R. C. Hodgson* executrix and executor of his will.


The testator died shortly after the date of the will, which was proved in April, 1835.

At the date of the will *Mary Ann Button* was the wife of *James Button*, and had two children, both of whom died in her lifetime.

James Button having died in 1837, *Mary Ann Button* in 1847 married the Plaintiff *Thomas Parker*, by whom she had one child, *William Henry Parker*. *Mary Ann Parker* died in September, 1851.

William Henry Parker died in April, 1860, under the age of twenty-one years, and in July, 1860, the Plaintiff took out administration to his estate and effects.

The bill stated that shortly after the death of the testator, the executors sold part of the property comprised in the residuary gift to *James Wood* and *Michael Hodgson* (two of the Defendants to the suit), subject to the charge thereon of the legacy of 400*l.* and interest, they having notice of such charge; that the testator's personal estate was insufficient for the payment of his debts, and that therefore the legacy was chargeable on the testator's residuary real estate; and that from the time of the decease of *Mary Ann Parker*, interest on the 400*l.* was paid to the Plaintiff and the Defendants for the use of *William Henry Parker* till the death of *William Henry Parker*.

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 PARKER
 v.
 HODGSON.

The Defendants to the bill were the surviving executor of the testator, and the purchasers of part of the residuary real estate.

Mr. *Baily* and Mr. *Prendergast*, for the Plaintiff, submitted that on the death of *Mary Ann Parker*, the legacy of 400*l.* was a vested legacy in *William Henry Parker*, and was not afterwards divested by reason of his death under twenty-one; and that the legacy was raisable out of the residuary real estate. They cited *In re Hart's Trust* (a); *Whittell v. Dudin* (b); *Re Corbett's Trust* (c).

Mr. *Kay* for the purchasers, *Wood* and *Hodgson*, contended that the legacy was not raiseable out of, but, in the events which had happened, had sunk into the residue. He cited *Smith v. Smith* (d); *Yates v.*

(a) 3 De G. & Jones, 195.

(b) 2 Jac. & Wal. 279.

(c) 1 Johns. 591.

(d) 2 Vern. 92.

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Phettiplace (a); *Carter v. Bletsoe* (b); *Stapleton v. Cheales* (c); *Jennings v. Looks* (d); *Chandos v. Tulbot* (e); *Prowse v. Abingdon* (f); *Van v. Clarke* (g); *Boycot v. Cotton* (h); *Pearce v. Loman* (i).

Mr. *Baily* in reply.

The VICE-CHANCELLOR.

There is no dispute as to the facts.

The question now raised is, whether under the circumstances of this case, and having regard to the manner in which the legacy is given, and all the directions in and provisions of the will, according to the law of this Court, the real estate is liable to pay this legacy. There is no doubt, as a matter of general principle, that according to the law of *England* (irrespective of any rule introduced from the civil law, first by the Ecclesiastical Court, and then by the Court of Chancery following that), if a sum of money be given to a person charged upon real estate, and that person being an infant is not to have the legacy immediately, but it is given "at twenty-one" or "payable at twenty-one," if the child does not attain the age of twenty-one, the legacy is not raisable out of the real estate, but sinks into it. The ground of this rule was, that the attainment of the age specified was regarded as a condition annexed to the gift of the capital, and if the condition was not performed, then the legacy was not raisable;

(a) 2 Vern. 416.

(b) Pre. Ch. 267.

(c) *Ibid.* 317.

(d) 2 P. W. 276.

(e) 2 P. W. 601.


(f) 1 Atk. 482.

(g) *Ibid.* 510.

(h) *Ibid.* 552.

(i) 3 Ves. 135.

and it made no difference whether the gift of the legacy was to the infant "at twenty-one" or "when he attains twenty-one," or "provided he attains twenty-one," or to the infant in the first instance and then adding "payable at twenty-one." Whichever of those forms is used, the law of *England* equally considers the attainment of twenty-one as a condition annexed to the gift. But then the Ecclesiastical Court, dealing with a legacy only as payable out of personal estate, adopted from the civil law a principle established by the old Roman law, that although a legacy given to an infant "at twenty-one" is not to be raised unless the infant attains twenty-one, yet if it be given to the child and made "*payable* at twenty-one," then, on the artificial principle of regarding it as *debitum in præsenti solvendum in futuro*, it is vested, and although the child does not attain the age of twenty-one, still the legacy is raisable and payable to his legal personal representative. It is vain to discuss the question which is the most rational view, though I cannot help saying that the rule of the English law is in my opinion the most rational, and that has been the opinion of many learned Judges. If a testator gives a legacy to an infant "at twenty-one," or gives it to him and makes it payable at twenty-one, he equally means it as a provision for the infant on attaining twenty-one; and if he does not attain the age he does not want it, and it is not the intention that it should be raised. The rule introduced from the civil law is a merely artificial rule, and is limited to the case of a legacy payable out of personal estate, and does not supersede the rule of the English law with respect to a legacy payable out of real estate. In the present case the legacy is payable out of the residuary real and personal estate, and interest is given in the meantime. The

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 v.
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personal estate is deficient : is the legacy raisable out of the real estate ?

I will refer shortly to some of the authorities on the subject—[His Honor then referred to *Smith v. Smith* (a); *Carter v. Bletsoe* (b); *Vanc v. Clark* (c); *Boycot v. Cotton* (d), and *Stackpole v. Beaumont* (e), and proceeded :]—The case of *Pearce v. Loman* (f) is almost identical with the present. In that case there was a gift of a legacy made payable at twenty-one with interest from the testator's death till it was payable, and the legacy was charged upon real and personal estate. The legatee dying under twenty-one, the legacy was held not raisable. It was there contended that the assets ought to be marshalled, but that was refused. That case is a direct authority on the question.

I think, therefore, that the legacy is not raisable out of the real estate, and there is no claim as against the purchasers. The bill must be dismissed with costs, as against all the Defendants.

(a) 2 Vern. 92.

(b) *Ibid.* 617.

(c) 1 Atk. 510.

(d) 1 Atk. 552.

(e) 3 Ves. 95.

(f) *Ibid.* 155.

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July 24, 31.

22 & 23 Vict.
c. 35, s. 27.
Executors'
Indemnity.
Leaseholds.

DODSON *v.* SAMMELL.

THIS was a petition for rehearing of a petition under the following circumstances :—

The suit of *Dodson v. Sammell* was an administration suit, and the testator in the cause being the owner of various leasehold properties, by the original decree an inquiry was directed as to what sum ought to be set apart out of the assets as an indemnity to the executors, against liability in respect of future breaches of covenants contained in the leases. The Chief Clerk certified that 1,100*l.* was a proper sum for that purpose; and accordingly by the decree on further consideration, made in 1857, a sum of 1,100*l.* was ordered to be paid into Court and set apart to indemnify the executors in respect of such covenants. Lord *St. Leonards'* act to further amend the law of property and to relieve trustees (a), having subsequently passed, the residuary legatee in 1859, presented a petition for the payment out of Court of the said sum of 1,100*l.* which had been so set apart, on the ground that under the 27th section of that act an indemnity was no longer necessary. Upon that petition coming on for hearing, the Vice-Chancellor being of opinion that the 27th section of Lord *St. Leonards'* act was not retrospective, refused to grant an order for the payment out of Court of the sum in question; but a similar order to the one prayed by the petition having been made in several other cases,

Fund which had been set apart out of residue to indemnify executors in respect of leaseholds of testator ordered to be paid out to residuary legatee, such indemnity, since the passing of the Law of Property Amendment Act, being no longer necessary.

The 7th section of the Law of Property Amendment Act is retrospective in its operation.

(a) 22 & 23 Vict. c. 35.

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 DODSON
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the present petition for rehearing the decree on further consideration was presented. It appeared that the trustees had sold and assigned to purchasers all the leaseholds except one, which had been assigned to the present Petitioner, the residuary legatee, who had entered into a covenant of indemnity to the executors with respect to it.

Mr. *Jessel*, in support of the petition, now asked for an order for the payment out of Court of the indemnity fund, and referred to *Dean v. Allen* (a); *Waller v. Barret* (b); *Fletcher v. Stevenson* (c); *Smith v. Smith* (d).

Mr. *Glasse* and Mr. *Fischer*, for the executors, contended that the indemnity fund should not be parted with. In the case of an action being brought by a person who was not in a position to pay costs, if the executors had no indemnity fund they might have to pay costs. They cited *King v. Malcott* (e); *Vernon v. Lord Egmont* (f); *Garratt v. Lancefield* (g).

Mr. *Jessel*, in reply.


THE VICE-CHANCELLOR.

Upon this petition of rehearing, the question is raised whether in any ordinary case of a suit to administer the estate of a deceased person, a fund should be set apart out of his general assets, to provide for the possible

- (a) 20 Beav. 1.
- (b) 24 Beav. 413.
- (c) 3 Hare, 360.
- (d) *Ante*, 384.

- (e) 9 Hare, 692.
- (f) 1 Bligh. N. H. of
Lords Cas. 554.
- (g) 2 Jur. N. S. 177.

event of a future breach of any of the covenants contained in a lease held by the deceased.

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 DODSON
 v.
 SAMMELL.

The law upon this subject is in a very unsatisfactory state. For a long time it has been the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability, which might in any reasonable probability arise, by reason of a future breach.

The only principle upon which this practice could stand must have been either that it was required as an indemnity to the executor or administrator, or that it was required for the protection and benefit of the lessor as covenantee.

As to the ground of indemnity to the executor or administrator, it is difficult to reconcile such a ground with the acknowledged principle, now at least well settled, that a decree or order of the Court directing the administration and application of the assets is of itself a complete and perfect indemnity to him, provided he keeps back nothing which ought to be disclosed to the Court. That principle was strongly and justly asserted by the Master of the Rolls in *Dean v. Allen* (a), and *Waller v. Barrett* (b). It seems strange that the Court should think it right to set apart a portion of the estate as a supplement to that indemnity which is already complete and perfect. Indeed I cannot help thinking that an executor, acting prudently, would desire no additional protection to that which the decree gives him, for an indemnity implies, and is an admission of, a risk;

(a) 20 Beav. 1.

(b) 24 Beav. 413.

1861.



DODSON

v.

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it throws a doubt on the sufficiency of the protection afforded by the decree. It is difficult to see why the executor should require, or the Court should provide, any indemnity beyond the indemnity of the decree. It seems to me an anomaly to set apart any portion of the assets on the ground of indemnifying the executor or administrator.


With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher v. Stevenson* (a), the Vice-Chancellor *Wigram* thought that although the decree of the Court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King v. Malcott* (b), the Vice-Chancellor *Turner* decided that there was no such equity, and dismissed a bill filed by the lessor to enforce it; and this seems to determine that the covenantee's right to protection is a ground that cannot be maintained.

The effect of setting apart a fund to answer future breaches of covenant is to throw a great burthen upon the residuary legatee, for instead of receiving his residue in the ordinary course, he would be kept out of a portion of it, possibly out of the whole, as long as any leaseholds of the testator were outstanding, for any period of time, however long. This is a very great evil to the residuary legatee, and should not be inflicted upon him, unless absolutely necessary. Now, so far

(a) 3 Hare, 360.

(b) 9 Hare, 692.

as respects the protection and indemnity of the executor and administrator, it appears to me altogether unnecessary; and as to the lessor, he has no such equity.

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 Dodson
 v.
 Sammell.

There is, however, a technical difficulty in the way of deciding this case on the general ground, namely, that the petition does not seek to rehear the original decree. When the case came on in 1857, upon the Chief Clerk's certificate for further consideration, it was a matter of course to carry out the former decree and certificate; the petition of rehearing is confined to the decree on further consideration. But there are other grounds upon which I am of opinion that the fund ought to be paid out, and that the former petition ought not to have been dismissed. The effect of the 27th section of Lord *St. Leonards'* act is, that if an executor has sold the leaseholds and assigned them to a purchaser, he may, without the order of the Court, and of his own authority, distribute the assets without making provision for future breach of covenant in the leases, and shall not be subject to any liability; and surely if he does so under the direction of the Court, *à fortiori* he would be free from liability. He is indemnified by the act, and therefore, so far as the leaseholds have been assigned to a purchaser, there is no ground for the indemnity. In this case the greater portion of the leaseholds have been sold and assigned to purchasers, but there is one which was not so assigned, and which, therefore does not come within the provisions of the act. Now, with respect to that lease, the rent reserved by the lease is less than the rack rent; and the lease is of such a value that it is of itself a sufficient indemnity for the rent reserved under the lease. Now under similar circumstances, in the two cases of *Dean v. Allen*, and *Waller v. Barrett*, the Master of the Rolls decided that, inde-

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 v.

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pendently of any general principle, the security was sufficient, because it would be more for the advantage of the lessor to eject than to bring an action on the covenant, and therefore it was not necessary to set anything aside for an indemnity. For these reasons, I am of opinion that the fund must be released. The costs of the executors and of the Petitioner must be taxed and paid out of the fund.

Nov. 20.

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Practice.
Distringas.

In re CROSS.

Distringas discharged with costs where made applicable by the person who obtained the writ to a sum of stock which was not the particular stock mentioned in the affidavit on which the writ had been granted.

General practice of the *Bank of England* with reference to writs of *distringas* observed upon.

THIS was a motion to discharge a *distringas*, which had been placed on a certain sum of stock under the following circumstances.

The *distringas* in question had been obtained by a Mr. *Cross*, who by his affidavit upon which he had obtained the writ had sworn that he was beneficially interested in a sum of 13,569*l.* 14*s.* £3 per Cent. Reduced Annuities, standing at the bank in the name of *Hannah Cross*. It was alleged by the counsel for the applicant, that the bank authorities had not been in the habit of requiring the production of the affidavit on which the writ was obtained, but that upon the production of the writ itself, with a notice signed by the person obtaining it, requiring the bank not to permit a sale, &c. of the stock in such notice mentioned, the bank prevented the transfer of and the receipt of dividends on the sum of stock mentioned in the notice. The writ in this instance was obtained upon the affi-

davit above stated, but the notice which with the writ was produced at the bank required the bank not to permit a sale, &c. of a sum of 4,522*l.* 2*s.* 4*d.* New £3 per Cent. Annuities standing in the name of *C. F. Maltby*, being stock of a different amount, different kind, and standing in a different name from that mentioned in the affidavit.

Mr. Glasse and *Mr. H. Fox Bristowe*, for *Mr. Maltby*, stated the above circumstances and moved to discharge the distringas so placed on the sum of 4,522*l.* 2*s.* 4*d.*, and referred to the 27th Consolidated Order, and to the act of 5 *Vict.* c. 5, s. 5.

Mr. Southgate appeared for *Mr. Cross*, who had become bankrupt, but who had been served with the notice of motion and submitted that his assignees and not *Mr. Cross* should have been served with the notice of motion, as they were the parties interested in supporting the distringas.

THE VICE-CHANCELLOR.

It is quite clear the distringas must be discharged. The Act of Parliament has prescribed only one form of writ of distringas. That form does not mention or even allude to any sum of stock whatever, but purports to have for its object the compelling the appearance of the governor and company of the *Bank of England* to a bill alleged by the writ to have been already filed against them, although in fact there is no such bill at all; whereas the real object and purpose of the writ is not to compel their appearance, but to prevent their permitting the transfer of a certain sum of stock standing in their books. This seems a very strange provision of the legislature.

1861.
In re
Cross.

1861.

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*In re*  
CROSS.

By the General Order of 17th November, 1841, framed in pursuance of the act (now the 27th of the Consolidated Orders) the party applying for the writ must make an affidavit to the effect that he is beneficially interested in the stock thereafter particularly described, specifying the amount of the stock which is to be affected by the writ, and the name of the person in whose name the same is standing; and on producing such affidavit to the Clerk of Records and Writs, the writ is sealed and issued, but the writ is not marked or indorsed with any sum of stock. The party having obtained the writ serves it on the *Bank of England*, together with a notice requiring the bank not to permit the transfer of the sum of stock mentioned in the notice, which of course ought to be the same sum of stock as that which was specified in the affidavit.

In this case *J. B. Cross*, having procured the writ of distringas upon an affidavit stating that he was beneficially interested in a sum of 13,569*l.* 14*s.* £3 per Cent. Reduced Bank Annuities standing in the name of *Hannah Cross* of such a place, served the writ on the governor and company of the *Bank of England*, together with a notice requiring them not to permit the transfer of a sum of 4,522*l.* 2*s.* 4*d.* New £3 per Cent. Annuities standing in the name of *C. F. Maltby* of some other place, the stock mentioned in the notice thus differing from that specified in the affidavit with respect to the amount, the denomination of stock, the name of the person in whose name it was standing, and the place of residence of that person. Whether (as is suggested), it is the practice at the bank not to require the production of the affidavit, or whether in this particular case the affidavit was overlooked through inadvertence, the proceeding was a fraudulent abuse by *J. B.*

*Cross* of the right conferred by the Act of Parliament with respect to the writ of distringas.

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*In re  
Cross.*

As to the objection, that the assignees under the bankruptcy of *J. B. Cross* ought to be served with the notice of motion, I think it is unnecessary to serve them. No right or interest in such a fraud could pass to them. They could not sustain the distringas, and it would be an useless expense to serve them.

The distringas must be discharged with costs.

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NEWTON *v.* THE METROPOLITAN RAILWAY COMPANY.

Dec. 5.

*Demurrer.  
Pleading.  
Executors,  
Rights of.*

**THIS** was a motion for an injunction in a suit for specific performance of a contract entered into between *W. Newton* and the company, for the sale to the company of certain leasehold houses.

The contract was made in March, 1861, and the purchase was under it to be completed on the 8th of May. The abstract had been approved by the company

tors had not proved. Notice of motion for an injunction was given; and at that time and when the motion would but for pressure of business have been heard, there was no probate; but when the motion was actually heard, the probate was in Court.

*Held*, that the Defendants could not resist the motion upon the ground of demurrer.

II. Although executors can make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists the executors cannot give a complete indemnity.

I. A bill by executors to enforce performance of a contract entered into by the Defendants with the testator for sale of leaseholds alleged, as the fact was, that the execu-

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and an assignment prepared and executed by *Newton* before the 8th of May ; and in addition to the purchase-money certain surveyor's and other costs to be paid by the company were agreed upon, so that there remained nothing to be done but to deliver the deed, and to pay the purchase-money and agreed costs. The company, being at the time unable to pay the purchase-money, requested the vendor to postpone completion, and he acceded to that, and delivered the deed as an escrow to Messrs. *Bower & Co.* his solicitors, to be by them delivered to the company on condition of their paying the money to Messrs. *Bower*, to whom he gave a written authority to receive it ; and he also gave the company a written direction to pay to Messrs. *Bower*.

The vendor took no steps to press for payment and completion ; and on the 10th of July he died, having appointed the Plaintiffs his executors. The Plaintiffs delayed proving the will until the 4th of December, when they obtained probate.

In the meantime they had applied to the company to pay the money, and considerable negotiation took place, in the course of which certain terms were proposed by Messrs. *Bower* on behalf of the Plaintiffs, all of which except one, viz., that the company should pay for the expense of proving the will, which was ultimately waived, were agreed to ; so that there was nothing remaining to be done but to assign the houses to the company on the one hand, and to pay the money and stipulated costs on the other. In the course of November, the company were ready to pay the money, but they declined to take the deed executed as an escrow ; the Plaintiffs then required of them to pay the money to them, upon their undertaking, on obtaining

probate, to execute a fresh assignment. This the company declined, but they offered to pay the money into any bank, to the joint account of the Plaintiffs' and Defendants' solicitors, to be by them paid to the Plaintiffs, upon their obtaining probate and delivering an assignment. This offer was declined by the Plaintiffs. The company then entered into possession of the houses, and the Plaintiffs threatening to file a bill, the company paid the purchase-money, but not the interest or the agreed costs, into Court, under the 69th section of the Lands Clauses Consolidation Act. On the same day, but after such payment, the copy bill was served.

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At the time the bill was filed, and at the time the notice of motion was given, and at the time when in the ordinary course it would have been heard, the will had not been proved; but on the hearing of the motion, the will had been proved, and the probate was in Court.

The bill alleged that the will had not been proved, and in fact it appeared by the evidence that at the time of the bill being filed, the will was still in the custody of the Plaintiffs' solicitors, Messrs. *Bower*.

Mr. *Clement Swanston* now moved for an injunction to restrain the company from taking possession or continuing in possession of the houses.

We were, before obtaining probate, in a position to give a title by delivering the deed already delivered as an escrow; a deed so delivered upon condition, and upon the condition being performed, being delivered to the assignee, becomes a complete deed; *Wms. Exors. (a)*; *Copeland v. Stephens (b)*; that objection therefore ought never to have been made.

(a) Page 1603 (5th edit.)

(b) 1 Barn. & Ald. 606.

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Then it is said, we could not before probate give a receipt. But it is clear that as the title of an executor is under the will, and not under the appointment of the Court of Probate, an executor's receipt before probate is valid after probate and relates back to the appointment of the executor; *Comber's Case (a)*; *Brazier v. Hudson (b)*; the company ought therefore to have taken our receipt, and ought not to have paid the money into Court. Moreover they have not paid into Court all they ought to pay, but only the purchase-money.

Further, this payment into Court, under the 69th section of the Act, is not a payment as regards us. It is paid into their own account, and they might take it out at any time behind our backs. Nor does that section apply to this case. The "executors" there spoken of mean executors of a person incapacitated to convey, not all executors. It is clear that we as executors are competent to sell our testator's leasehold property; we do not therefore come under the general designation of persons having a limited estate only. We have an absolute capacity to sell and assign before probate.

Then as to the conduct of the parties, the necessity for this suit arose originally out of the default of the company. They ought to have completed by the 8th of May, and then there would never have been any dispute; the dispute arises from the complication they have introduced by keeping us out of the money till after the testator's death. Then since that, the company has throughout kept us at arms' length, and refused every reasonable proposition.

(a) 1 P. Wms. 766; S. C., (b) 8 Sim. 67.  
 Wms. Exors. 255.

Mr. *Glasse* and Mr. *Bovill*, for the company.

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First. As to the conduct of the parties, the reasonableness has been all on our side. Even if we were wrong in strict point of law, as to the right of the executors to receive the purchase-money, it is clearly not usual to pay considerable sums to executors before probate. Then why did the executors delay obtaining probate? Had they used due diligence, there could have been no dispute, for we have been ready with the money, and that is not disputed, for a long time. Then look at the dates; according to the affidavit of the Plaintiff's own solicitors; they were proceeding and expecting on the 29th of November, to have the probate. They knew there was no dispute as to the sum to be paid, but only as to the hands to receive it, and when they were on the eve, according to their own showing, of obtaining probate, which would have put an end to every ground of difference, they file this most unnecessary and vexatious bill.

This is a case therefore in which the Court will not treat the Plaintiffs with any favor, and in which every objection however technical ought to have weight.

Now, 1. This bill is demurrable, and you may show ground of demurrer on a motion.

The bill on the face of it alleges, that the executors have not proved. Now we quite admit, that an executor may before probate file a bill, but he cannot go to a hearing, or obtain any order founded on his right as executor, till he produces the probate, because the



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probate is the proper and only evidence of his title; *Simons v. Milman* (a). But then it is said, that now the executor has the probate, and if the bill had alleged that the executor had proved, which is the usual form of pleading, no doubt they might now produce it in evidence; they cannot produce evidence not merely of matters not alleged by the bill, but matters directly contradicting the allegation of the bill; the Court will not look at the probate and will treat this as a motion, founded on a demurrable bill.

2. We do not deny that an executor's receipt given before probate is good and complete, but it is good only because he is executor, and the only evidence of his executorship is the probate. Suppose the executor never proved, and no probate was ever obtained, and suppose before probate the will destroyed or lost, we should have no evidence of the title of the Plaintiffs to assign and to receive the money. We were clearly right therefore in refusing to pay before probate.

Next it is said, that the delivery of the deed delivered to Messrs. *Bower* as an escrow upon our paying the money to Messrs. *Bower* would make the deed complete. It is unnecessary to argue whether that would be so if Messrs. *Bower* had authority to receive the money, because it is quite clear that by *Newton's* death, his authority to Messrs. *Bower* to receive the money was gone, and therefore to perform the condition on our part was impossible.

Lastly, our payment of the money into Court was right, and having so paid it, we had a right to possession under

(a) 2 Sim. 241.

the statute. The word "executors" is expressly used, —the persons entitled here are the executors; until probate, they had but a limited estate, because they could not make a title supported by evidence of title. We conformed therefore strictly to the statute, and were entitled before the bill was filed to the possession.

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Mr. *Glasse* then offered at the bar to pay at once the purchase-money and interest and the agreed costs, upon the Plaintiff consenting to dismiss his bill with costs; but this offer was refused.

Mr. *Clement Swanston*, in reply.

The VICE-CHANCELLOR expressed his regret that such a litigation should have taken place, where there was really nothing substantial in dispute, and then continued:—

I am called upon by both sides to determine the strict and absolute rights of the parties; and I cannot say that I entirely agree with either party upon all the points argued. It appears that in March, 1861, *W. Newton* was the owner of a leasehold interest in four houses; the company served upon him the usual notice to take the premises, and the result was a special contract for the sale of the premises to the company for a certain sum. By that contract the purchase was to be completed by the 8th of May, and certain costs and expenses were agreed to be paid by the company; about the amounts there has never been any dispute.

When the abstract was delivered, the company accepted the title, an assignment was prepared and agreed to by both parties, and in fact was executed and de-  
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livered by *Newton* as an escrow ; the condition was, that on payment to Messrs. *Bower*, his solicitors, the deed should be delivered. *Newton* at the same time gave to the company an authority to pay to Messrs. *Bower*, and to Messrs. *Bower* an authority to receive, the money.

The company not being in funds, did not pay at the stipulated time, and *Newton* forbore to take any steps to compel them, so that the first impediment thrown in the way of completion was by the company. Unfortunately in that state of things *Newton* died, having made his will and appointed the present Plaintiffs his executors.

After the death of the vendor, the company found itself in a condition to pay the money. But then for some reason, which does not appear, the executors, though they intended to prove, had not proved, and did not prove until very recently. In the absence of explanation, it does seem to have been an unnecessary delay, and at this point the impediment to completion was on the part of the Plaintiffs.

Then the parties began to negotiate, and certain terms were proposed by Messrs. *Bower* for the Plaintiff, one of which was that the company should pay probate and legacy duty. That requisition was afterwards given up, and to the rest of the propositions no objection was made, so that there was nothing in dispute except as to the mode in which the terms agreed upon should be carried into effect. At this period there was still no probate. The Plaintiffs then required that the money should be paid to them on their undertaking that on obtaining probate they would execute an assignment. To that proposition of the executors, the company objected (and I think justly) that it was not reasonable,

but they offered to deposit the money in two names as trustees till the probate should be obtained, on trust to pay it to the Plaintiffs on the execution of an assignment. Unfortunately the parties could not come to any arrangement, the Plaintiffs refusing every thing except payment, and the company objecting to pay until probate should be obtained and a conveyance made. Under these circumstances the company thought they were entitled to pay the money into Court under the 69th section of the Lands Clauses Consolidation Act, and they did pay in the amount of the purchase-money, and thereupon took possession. And then the executors filed this bill for specific performance, and for an injunction.

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The first point that was argued is upon the form of the bill, which alleges, according to the truth, that probate had not been obtained; and it is contended on the part of the company, that on this ground the bill is demurrable, and that this is a conclusive answer to the application for an injunction; and that the application ought to be refused, because when the notice of motion was given there was no probate, although it appears that there is probate now. I can only say if that contention is valid, it must follow that in such a case as this, if the grant of probate was delayed from any cause whatever, the purchaser might, without paying his purchase-money, enter into possession of the premises, and do what he pleased with them, and set the executors of the vendor at defiance, on the ground that no bill could be filed, or at least no injunction could be had against him unless the bill alleged a falsehood. I cannot accede to that proposition. I think it was perfectly competent to the Plaintiffs to file their bill alleging the truth as to the probate not having been yet

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granted, &c., alleging that the company had taken possession, and to apply for an injunction to restrain them from retaining possession until the purchase-money was paid, even if the grant of probate was still delayed. But here, although at the time when the notice of motion was given, there was no probate, yet now, the probate has been granted and is actually in Court.

The next question is, whether, under the circumstances of this case, payment into the bank justified the company in taking possession; and I think it did not. This was not a case of notice given by the company to executors of their intention to take the premises, and requiring to have the amount of the purchase-money ascertained, in one or other of the modes pointed out by the act. Here there had been a special contract with *Newton*, and under that contract the executors of *Newton* were entitled to have the purchase-money paid to them by the company. By the contract the matter is withdrawn from the operation of the act, as between the company and the executors. It has been argued that the word "executors" in the 69th section brings the case within that section, but that would be inconsistent with the words which immediately precede that section, and which form the heading to that and several subsequent sections. These words show that the intention of the legislature was, that the 69th and subsequent sections should apply to cases in which the company is dealing with executors and other persons having limited interests, for the taking of lands. Here the contract was with *Newton* himself, who clearly had not a mere limited interest, and not with his executors, and I think the 69th section has no application to this case.

We come next to the question about the deed delivered

as an escrow. Now I assume that that deed would, on performance of the condition attached to the escrow, have been perfectly and completely effectual. But the condition was, that payment should be made under *Newton's* authority to Messrs. *Bower*, his solicitors, and by the death of *Newton* that authority was determined, so that the company could not perform the condition, and I think they were justified in refusing to make the payment to Messrs. *Bower*.

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After that refusal it seems to have been assumed on both sides that there must be an assignment by the executors, and I think the company were justified in saying, "we cannot pay you till you are in a position by obtaining probate, to give us a conveyance and a complete discharge for the purchase-money." The company now say, they are willing to pay in any way the executors like, (the probate having been obtained,) if the executors will give them a conveyance. And under all the circumstances of this case, I think that what I ought to do is this: the company bringing into Court in this cause the purchase-money and the smaller sums agreed upon, I shall not grant any injunction. But if that is not done, then I should grant an injunction.

Ultimately it was arranged, that the company should obtain payment out of the bank of the money paid in; and should pay to the Plaintiff all that had been agreed, and upon that being done and a conveyance executed, that the bill should be dismissed without costs.

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Nov. 25.  
Dec. 3, 4.

Arrears of  
Annuity,  
Right to  
Recover.

UPTON v. VANNER.


A testator devised his real and personal estate to trustees (of whom his wife was one) upon trust for conversion and to invest in government or real securities, and that his trustees should stand possessed of the trust premises to pay his wife an annuity of 100*l.* clear of all deductions whatsoever, and directed the trustees to appropriate and set apart a fund for securing such annuity, and after the death of his wife directed the trustees to pay and divide or transfer the money thereinbefore appropriated and directed to be set apart among his (the testator's) children. Part of testator's property consisted of 2,500*l.* £4 per Cent. Stock, which at his death, and for some time after, produced 100*l.* a-year; this fund was set apart by the trustees for securing payment of the widow's annuity, but owing to successive reductions of the interest of the stock by Parliament, there was, at the widow's death, a considerable arrear to make up the deficiency between the 100*l.* a-year and the reduced income of the fund which had for many years been received by the widow. *Held*, that on the construction of the will the widow would have been entitled to have the deficiency made good out of the corpus; but that she having forborne to assert her claim for so long a period during her lifetime, and having been aware of the dealings of several of her children, in respect of their shares, with persons who were acting on the belief that they were shares in a certain definite amount of stock, without giving any intimation of her intention to claim such arrears out of the corpus, the representatives of the widow could not, as against the parties who so dealt for value, with the knowledge of the widow, assert the claim, to which she would otherwise have been entitled, to have the arrears of the annuity made good out of the corpus.

remainder of the said dividends and annual income, when and as the same should become due, or such parts thereof as his said trustees or trustee should deem prudent and necessary for the maintenance, &c., of all and every his children, as well daughters as sons, until they should severally attain their respective ages of twenty-four years; and when and as his said child or children should attain such age of twenty-four years, then in trust to transfer, pay and divide the said trust monies, stocks, funds and securities, together with such accruing interest, dividends and income as might not have been expended in the maintenance, education and bringing up of his said children as aforesaid, (after deducting so much thereof as would be sufficient to produce a clear yearly interest of 100*l.*, without any deduction whatsoever in order to satisfy the said annuity to his said wife, and which money so to be deducted he thereby directed his said trustees or trustee for the time being to appropriate and set apart for securing the said annuity during her life as aforesaid,) unto and equally between all and every his children, if more than one share and share alike, and if but one then to such one child; and the testator directed that if any of his children should die in his lifetime, or before they should have attained twenty-four, then that the share of such child should go to his or her child or children. And upon the death of his said wife, the testator directed his said trustees or trustee for the time being to pay and divide or transfer the money thereinbefore appropriated and directed to be set apart for securing to his said wife the said annuity of 100*l.*, thereinbefore mentioned, unto and amongst all and every his said children share and share alike, but nevertheless upon the same terms and conditions as were thereinbefore declared of his said trust monies.

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The testator died in September, 1821, and his trustees having paid his debts, &c., shortly afterwards appropriated and set apart a sum of 2,500*l.* £4 per cent. Annuities, of which the testator died possessed, to answer the annuity of 100*l.* a-year to the testator's wife, the dividends on that sum being at that time sufficient to answer the annuity.

The testator left six children, namely:—*Edmund Upton, Elizabeth Upton, Frederick Upton, Emma Upton, Marianne Upton, and Charles Upton.* All these children attained the age of twenty-four years, and upon their respectively doing so, the trustees distributed and divided the testator's trust estate, except the sum of 2,500*l.* stock, which had been appropriated by them to answer the wife's annuity.

The testator's wife *Elizabeth Upton* received the annuity of 100*l.* a-year arising from the 2,500*l.*, till July, 1830, when the stock was converted into £3 : 10*s.* per cent. Annuities, and the testator's wife from thenceforth received only 87*l.* 10*s.* a-year, being the dividends on the stock when so reduced, till October, 1844, when the £3 : 10*s.* Annuities became further reduced to £3 : 5*s.* Annuities, and thus only produced 81*l.* 5*s.*, and in October, 1854, the £3 : 5*s.* Annuities were converted into £3 per cent. Annuities, and only produced 75*l.* a-year, which the testator's wife continued to receive up to the time of her death in 1860, the reduction of the stock from £4 per cent. to £3 per cent. Annuities having caused a deficiency in the amount received by the testator's wife of 487*l.* odd in respect of her annuity of 100*l.* a year.

*Elizabeth Upton* died in February, 1860, leaving the

Plaintiff *Edmund Upton* her legal personal representative, and he claimed to be entitled to receive out of the sum of 2,500*l.* stock the amount of the deficiencies of the annuity of the said *Elizabeth Upton*.

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The Plaintiff *Edmund Upton*, in 1841, sold and assigned his share in the 2,500*l.*, payable on the death of the testator's wife to *Elizabeth Smith* (then *Elizabeth Upton*).

*Elizabeth Upton* before her marriage, in 1841, assigned her own share in the sum of 2,500*l.* stock, and the share she had purchased of *Edmund Upton*, to trustees upon trust for herself for life, and after her decease in trust for her husband or the children of the marriage as she should appoint; and she shortly afterwards appointed the two shares to her husband *Frederick Robert Smith*.

It appeared that the said two shares of *Frederick Robert Smith* and the shares of *Mary Ann Upton* and *Emma Upton* had become vested in *George Henry Gater* as mortgagee thereof, and that the testator's widow *Elizabeth Upton* had concurred in the indentures assigning or transferring those shares to *George Henry Gater*.

The share of *Emma Upton* in the stock was, by a settlement on her marriage with *John Biden*, in 1849, assigned (subject to the mortgage thereof to *Gater*) to *Frederick Robert Smith* and *William Henry Maberly*, upon certain trusts.

The share of *Frederick Upton* had been assigned by way of mortgage to the Defendant *William Jolly*, as

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mortgagee thereof; and the share of *Charles Upton* had been assigned by way of mortgage to the Defendant *John Hutchinson*.

The above suit having been instituted for the administration by the Court of the trusts of the testator's will, so far as the same had not been performed, the question arose as to the rights of the different parties in the sum of £2,500 £3 per Cent. Annuities, which upon the death of the testator's widow became divisible among the six children.

*Mr. Baily* and *C. Herbert Smith* appeared for the Plaintiffs and submitted, that according to the true construction of the testator's will, a clear annuity of 100*l.* a-year was intended for the widow, *Elizabeth Upton*; and that her omitting to call for the deficiency during her lifetime had, in fact, been rather beneficial than otherwise to the persons entitled subject to her life interest, and that her representative was now entitled to claim full payment of the arrears.

*Mr. Cole* and *Mr. Wickens*, for the Defendant *Vanner*, the surviving trustee, took no part in the argument.

*Mr. C. M. Roupell* for the Defendant *Maberly*. There has been a severance and appropriation of the fund after the testator's death; and there has been an actual division of the residue among the children when they attained the requisite ages. It is obvious that a division of the actual fund after the widow's death was intended from the gift over, which could not possibly be made if the fund were to be resorted to from time to time to make up any deficiency; *Foster v. Smith* (a); *Baker v. Baker* (b).

(a) 1 Phill. 629.

(b) 6 H. of Lords Cas. 616.

Mr. *Bazalgette* and Mr. *Southgate* for the Defendant *Gater*. The relation of tenant for life and remainderman was clearly intended by the testator to be created between his widow and children in the fund intended to secure this annuity. It was inconsistent with such intention that the fund should sustain diminution, perhaps entire annihilation, by being resorted to from time to time, to make up the deficiency arising by the accidental deterioration of an investment which had been chosen by the widow herself, as one of the trustees of the will, for securing the payment of this annuity. Moreover, the long acquiescence of the widow (during her whole life) would preclude her representative from now enforcing the claim for arrears; *Stafford v. Stafford* (a). Her standing by and allowing dealings to take place, on the faith of the fund being not liable to diminution, would be an estoppel to this claim; *Olliver v. King* (b); *Slim v. Croucher* (c). At all events, as against Defendant *Gater*, the representatives of Mrs. *Upton* were estopped; for she had herself joined in a deed to him, in which the shares of the children were treated as shares in a definite amount of stock.

Mr. *Glasse* and Mr. *Waller*, for the Defendant *Jolly*, submitted that the widow was not entitled to more than the interest of the fund set apart; and that if she were, her long acquiescence had estopped her and her representatives from now claiming the arrears. If estopped, she must be so as to the *whole* fund, and each individual share.

Mr. *Collins* and Mr. *Tapp* for the Defendant *Hutchinson*. If the relation of tenant for life and remainder-

(a) 1 De G. & J. 193.

(c) 1 De G. F. & J. 518.

(b) 8 De G. M. & G. 110.

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man were intended to be created by the testator, between his widow and children, that would be decisive of the question; *Chambers v. Chambers* (a). The indication of such intention must be sought for in every part of the will; in addition to the direction to appropriate a fund to secure the annuity, and the gift over of the very thing, there was here a power to invest on mortgage, a circumstance so much relied upon in the case of *Baker v. Baker* (b). There was also in this will a power to the trustees to advance to the full extent of the presumptive share of the children during minority, an exercise of discretion which would be extremely embarrassing, if the residue were liable to be resorted to, to make good any accidental failures of the fund set apart to secure the annuity. But, whatever might be the construction of the will, the widow being herself a trustee, and having concurred in the investment (which was not a proper one according to the doctrine of this Court), her representative could not now claim, particularly against third parties, who had, with her knowledge, dealt upon the faith of the fund not being liable to diminution, to have the arrears made good out of the corpus. It was an old doctrine of equity, and one which was also now adopted at law, that a person, who allowing others to deal upon the belief of a state of facts, which he might contradict and did not, should not be allowed to set up rights of his own derogating from interests which third parties had, for valuable consideration, acquired on the supposition of the existence of facts which the silence of the person interested in stating the contrary led him to believe in. The doctrine has been applied in various cases, the circumstances of which differ from this case, and from each other, but

(a) 15 Sim. 183.

(b) 6 H. of Lords Cas. 616.

the same principle has been admitted in all; *Hunsden v. Cheyney* (a); *Raw v. Pote* (b); *Mocatta v. Murgatroyd* (c); *Govett v. Richmond* (d); *Boyd v. Belton* (e); *Nicholson v. Hooper* (f). Here the evidence shows that Mrs. *Upton* had notice of the dealings of her son *Charles* with his share, and that it was treated and described as an absolute reversionary interest in a trust fund of 2,500*l.* stock, and that *Hutchinson* purchased the share of *Charles Upton* upon the faith of its being a full sixth share in a definite amount of stock, and that Mrs. *Upton* was written to previous to the completion of the purchase, giving her notice of such purchase, and inquiring if she knew of any incumbrances, and that she acknowledged the receipt of the letter, and did not then, or at any other time, during her life, give any intimation of her having any claim on the fund for arrears. The same *Edmund Upton*, now Plaintiff as the administrator of his mother, joined in the sale and assignment to *Hutchinson* and received a part of the purchase-money, as the administrator of his deceased brother *Charles*.

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Mr. *Baily* in reply.

The contention of all the Defendants is identical as to the construction of the will; viz. that under it Mrs. *Upton* was only entitled to the interest of the fund when set apart, whatever that amount might be. But it is clear that the thing intended was an annuity, which was given out of, and was a charge upon, the whole estate; *May v. Bennett* (g); *Boyd v. Buckle* (h); *Croly v.*

(a) 2 Vern. 150.  
 (b) 2 Vern. 239.  
 (c) 1 P. Wms. 393.  
 (d) 7 Sim. 1.

(e) 1 Jo. & Lat. 730.  
 (f) 4 My. & Cr. 185.  
 (g) 1 Russ. 370.  
 (h) 10 Sim. 595.

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*Weld (a); Wright v. Callender (b).* As to the appropriation of a particular fund, it was not binding as fixing the rights of the parties, but was only intended as a *security*. As to the investment in £4 instead of £3 per Cents, the will did not require the trustees to change the investments existing at the testator's death, and this very fund was part of the testator's own stock. With regard to acquiescence, a person cannot be bound by acquiescence, unless fully aware of his rights: here there is nothing to show that Mrs. *Upton* was aware that she was entitled to resort to the corpus for deficiency of income; indeed, there is every reason to presume that she was not so aware; *Cholmondeley v. Clinton (c); Marker v. Marker (d); Downes v. Bullock (e); Re Ashwell's Will (f).*

[The VICE-CHANCELLOR: But if Mrs. *Upton's* right existed, according to the true construction of the will, *that* was a conclusion of law, which every one must be taken to know, "ignorantia juris neminem excusat."]

At all events the doctrine of estoppel cannot apply where the circumstances are known to both sides, or equally in the power of both to become acquainted with. All the cases cited by my learned friends, the counsel for the Defendants, are cases where there was either some suppression of a fact which was known only to one party, and which the other had no means of knowing, or there was a false statement, known to be false to the party making it, or there was a direct answer to a direct inquiry, circumstances which, in the view of this Court, would impress the transaction with the character of fraud. But here there was the same

(a) 3 De G., Mac. & G.  
 993.

(b) 2 De G., Mac. & G.  
 652.

(c) 2 Mer. 361.

(d) 9 Hare, 16.

(e) 25 Beav. 54.

(f) Johnson, 112.

source of information open to all parties, in the will, of which all must be taken to have had notice; and the question was never directly asked of *Mrs. Upton*; *Arundell v. Arundell* (a); *Pickering v. Lord Stamford* (b); *Holmes v. Custance* (c). With regard to the communications made to *Mrs. Upton* on the part of the Defendants *Gates* and *Hutchinson*, and those through whom they claim, and her joining in the deed to *Gates*, and the general words which may have been there introduced, all this was done "*diverso intuitu*," and cannot conclude the rights of *Mrs. Upton* or her representatives on this question.

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The question in this case arises with respect to a sum of 2,500*l.* New £3 per Cent. Annuities, which was originally 2,500*l.* £4 per Cents, whether the representatives of the testator's wife, to whom he bequeathed an annuity of 100*l.*, is, on the construction of the will, and under the circumstances that have occurred, entitled to go upon the corpus for the arrears of the annuity, which the reduced income of the fund was not sufficient to satisfy.

First, what was the widow's right upon the construction of the will? If the will had stopped immediately after the first gift of the annuity with the words "such of the days as shall first happen after my decease," there was without doubt a dedication by the testator of the whole property, principal and interest, to provide the annuity of 100*l.* a year for his widow during her life. Then the testator, assuming that the

(a) 1 My. & K. 316.  
 (b) 2 Ves. jun. 272.

(c) 12 Ves. 279.




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income of his property would be more than sufficient to provide the annuity (which it was), proceeds to direct that the surplus income should be applied to the maintenance and education of his children, till they should severally attain the age of twenty-four. In my opinion that was not sufficient to cut down the previous gift, or to take away the right of the widow to resort (if necessary) to the corpus of the property for payment of the annuity. Then follows the trust to divide the property among the children, on their severally attaining the age of twenty-four, with the direction, in the parenthesis, to set apart a fund to secure the annuity, and the gift of that fund, upon the death of the wife, to the same class of children. What then was the testator's intention? Did he mean to give the widow an annuity of 100*l.* at all events and under all circumstances, and subject to that annuity to give the residue to the children? or did he mean to give a certain specific fund, however the income of that fund might fluctuate, to the widow and children as tenants for life and remaindermen? Great difficulty has arisen in deciding this question, with reference to the varying language of different wills. The intention must be collected from a consideration of the whole will taken together. Upon looking through the various cases, there appear to be decisions both ways, and it is not easy always to draw the distinction between cases in which opposite decisions have been come to; but I think the nearest case to the present in principle is *Wright v. Callender (a)*, in which the Lords Justices decided that the intention was that the annuitant was at all events to have the annuity in full. As an example of a contrary conclusion, but consistently with the decision in *Wright v. Callender*, I may refer to

(a) 2 De G., Mac. & G. 652.

the case of *Baker v. Baker* (a). In the present case I feel no doubt that the testator intended his wife to have at all events an annuity of 100*l.*, and had the income been insufficient, the corpus might have been resorted to; and it is to be observed, with respect to the fund which is to be set apart for the annuity, when the residue is to be divided among the children, although the testator directs that it shall be so much as shall be sufficient to produce a clear yearly interest of 100*l.*, he does not limit his wife to the income of that fund, but directs the trustees to appropriate and set apart that fund "for securing the annuity during her life." The passage chiefly relied upon against the widow, was that which directs that, after her death, the money which was to be set apart to secure the annuity should be divided among the children. But I do not think that that is sufficient to prevail against the strong evidence afforded by the whole will that the testator intended that his wife should, under all circumstances, have a full annuity of 100*l.* during her life. *Wright v. Callender* is a strong case; for in that case there was not only a specific clause providing that the fund set apart to answer the annuity should, on the death of the annuitant, go to the testator's children, but it was given to a different class of children from those to whom the residue was given; and upon that chiefly, when the case was before me, I came to the conclusion that the intention was to keep the fund intact. But the Lords Justices took a different, and I am persuaded a right view, deciding that it was a case of an annuity, and not of tenant for life and remainderman. Upon the whole I am of opinion, that upon the true construction of the will, the widow had the right (if necessary) to resort to

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(a) 6 H. of Lords Cas. 616.

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the corpus of the testator's property, or any part thereof, for payment of her annuity.

Then comes the question, whether what has subsequently taken place has precluded the widow or her representatives from setting up her right against the Defendants. It has been contended, that being herself a trustee, it was her duty to have devoted a sufficient fund to pay the annuity out of the income thereof, and that it was a breach of trust the not having done so. But so far from injuring the children, what has taken place has in fact benefited them, for upon attaining twenty-four years, they received a larger portion of the residue than would otherwise have been then distributed among them. That circumstance, therefore, cannot affect the right of the widow. The next circumstance is, that although the widow lived for thirty years after the first reduction of the income of the fund, she made no claim upon the corpus. If she induced parties to deal with the fund upon the assumption that she had no claim on the corpus, she might be precluded; but not by mere abstinence from claim. Her having so long abstained from claiming has been beneficial to the reversioners; and it cannot now operate as a bar to the claim. But as against *Gater* the claim of Mrs. *Upton* cannot be enforced, because she actually concurred in inducing him to advance his money upon the security of her share of some of the reversioners, which it was stipulated should not be diminished by any claim by herself or other persons. With regard to *Jolly* it does not appear that Mrs. *Upton* knew of the transaction, and therefore, I cannot hold that he has a right to be paid in priority to her. The Defendant *Hutchinson* stands in a different position; for when he was about to become a purchaser of one of the shares, Mrs. *Upton*

was written to for information as to whether there was any incumbrance on the share, the subject of the sale; and she was silent as to any claim of her own. Her representative, therefore, is precluded from raising any question as to this share.

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Nov. 6.  
  
*Practice.*  
*Revivor.*  
 15 & 16 Vict.  
 c. 86, s. 52.

WARD v. SHAKESHAFT.

MR. G. N. COLT applied for a common order to revive this suit, which had become abated through the death of the sole Plaintiff. It appeared that Plaintiff had died intestate, and that his heir had taken out letters of administration to his estate. Doubts had been entertained as to whether the case was a transmission of interest within the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 52, so as to render a common order sufficient, or whether it would be necessary to file an original bill in the nature of a bill of revivor. Vice-Chancellor *Stuart* had, under similar circumstances, granted a common order to revive in *Jackson v. Ward*(a) and *Lowe v. Watson* (b), but Vice-Chancellor *Wood* had refused in *Dendy v. Dendy*(c) and *Williams v. Williams* (d).

Common order to revive granted to administrator of sole Plaintiff, by whose death the suit had become abated.

The VICE-CHANCELLOR, after taking time to consult the Registrar, said he was of opinion that the case came within the act, and accordingly granted the common order of revivor.

(a) 1 Giff. 30.

(b) 1 Sm. & Giff. 123.

(c) 5 W. R. 221.

(d) 9 W. R. 296.

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*Practice.*  
*Jurisdiction.*  
*Appearance.*

FELKIN v. LORD HERBERT.

The Court will not, upon the question whether an appearance shall be entered for a Defendant, enter into the question of jurisdiction.

Therefore, where a Plaintiff moved for leave to enter an appearance for the Defendant, her Majesty's Secretary of State for War, and the Defendant appeared on such motion under protest, and raised the question as to the jurisdiction of the Court upon a bill, submitting that the proper course would have been by Petition of Right, the Court refused to enter into the question of jurisdiction, and gave the Plaintiff leave to enter an appearance for the Defendant.

**T**HIS was a motion by the Plaintiffs for leave to enter an appearance for the Defendant in the above suit, the three weeks within which the Plaintiffs might have entered such appearance for the Defendant as of course having expired.

The suit was instituted by the Plaintiffs, the Local Board of Health of the town of *Sheerness*, for an injunction to restrain the Defendant, the late Lord *Herbert*, as her Majesty's Secretary of State for War, from stopping up a certain ditch in the outskirts of *Sheerness*, and thereby interfering with the free user of the ditch, which the Plaintiffs alleged had been enjoyed for upwards of thirty years, for sanitary purposes.

The Defendant, upon being served by the Plaintiffs with a notice of motion for an injunction, and a copy of the bill, being advised that the Plaintiffs' proper remedy would have been by petition of right and not by bill, informed the Plaintiffs' solicitors, by letters, that he did not intend to take any proceedings. The time for entering an appearance by the Defendant having elapsed without appearance having been entered by the Defendant, and the three weeks allowed to the Plaintiffs to enter an appearance for the Defendant as of course having expired, the Plaintiffs now moved for leave to enter an appearance for the Defendant.

The Defendant appeared on this motion under protest, and the question, as to whether the proper course

was by bill or petition of right, was argued at great length.

The VICE-CHANCELLOR having decided the case on a totally different ground than that on which it was argued, it is not necessary to notice the cases cited on the question of jurisdiction.

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Mr. *Hallett* appeared for the Plaintiffs, and

Mr. *Wickens*, for the Defendant, the Secretary of State for War, appeared under protest, and submitted that the Court had no jurisdiction on a bill, but that the Plaintiffs' proper course would have been by petition of right.

The VICE-CHANCELLOR :

This is an application on behalf of the Plaintiffs, for leave to enter an appearance for Lord *Herbert*, the Defendant, the eight days for appearance having elapsed.

It is insisted on behalf of Lord *Herbert*, that the Court has no jurisdiction in the matter, inasmuch, as the proper course of proceedings to obtain the relief sought by the suit would be by a petition of right, the property in respect of which the relief is sought being vested in Lord *Herbert* as her Majesty's Secretary of State for War, and as a trustee for the Crown. The matter has been fully argued on that question ; but I feel constrained to decide the case on a ground altogether different.

I feel obliged to decide, that the course which has been taken by the Defendant is not the proper course .

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of proceeding. The Defendant ought to have appeared, and then have raised the question of jurisdiction by demurrer or otherwise, as he might think fit. Until an appearance has been entered, it is not competent to the Defendant to raise the question of jurisdiction. This Court will not, under any circumstances, recognize the right of any subject to say that he will not appear because the Court has no jurisdiction over him in the matter. To recognize such a right would be introducing a practice derogatory to the authority of the Court, and of the Queen's writ. It is not for any individual to say, "I object to appear, I will not obey the Queen's command to appear, I will not submit myself to the authority of her Majesty's Court, because I consider that the Court has no jurisdiction over me in relation to the matter in question." I do not say that I have not formed an opinion on the question of jurisdiction; but I consider it to be my duty to abstain from deciding that question at present, on the ground which I have stated, namely, that it was the duty of the Defendant to have appeared, and then to have raised the question by demurrer or plea, or otherwise, as he might be advised. According to the practice of the Court, where the Defendant does not appear, the old process of attachment is not open to the Plaintiff except under the express authority of the Court; but in exchange for that right, there is substituted a power for the Plaintiff to enter an appearance for the Defendant. If within three weeks after the expiration of the eight days allowed for appearance the Plaintiff applies to the clerk of records and writs, that officer enters an appearance as a matter of course; and the rule that after the expiration of three weeks there must be an application to the Court, and that the Court is to exercise its discretion as to granting or refusing it, does

not make it right that the Court should, upon such an application, entertain the question as to its jurisdiction over the Defendant in respect of the matter.

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Under these circumstances, I feel bound to abstain from deciding the question of jurisdiction which has been raised; and to make an order that the Plaintiffs be at liberty to enter an appearance for the Defendant.

ST. AUBYN v. ST. AUBYN.

July 29, 30.

**THIS** was the petition of *James St. Aubyn*, one of the Defendants. *Apportionment Act.*  
*Thellusson Act.*  
*Royalties.*

By a deed dated the 12th July, 1832, certain estates of Sir *John St. Aubyn* in *Devon* and *Cornwall* were settled upon trust at the expiration of twenty-one years from Sir *J. St. Aubyn's* death, or sooner, at the discretion of the trustees, to raise by mortgage of any part or by sale of any part not situate in *Cornwall*, the sum of 64,000*l.*, and until the raising of that sum to pay interest thereon out of the rents and profits; and also out of the rents and profits to pay certain annuities; and subject thereto upon trust for Sir *J. St. Aubyn* in fee. The deed declared the trusts of the 64,000*l.*

The Apportionment Act applies to the case of the expiration of a term in trustees to accumulate rents, for payment of debts, legacies and other charges, with remainder to a tenant for life; as well as to the common case of an estate for life to A.,

remainder to B. And the term being for twenty-one years from the testator's death, the *Thellusson Act* does not apply to prevent apportionment.

But the Apportionment Act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents, payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine.



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Sir *John St. Aubyn* by his will, dated the 13th July, 1832, recited and confirmed the settlement; and he gave his personal estate upon trust for sale and conversion, and payment of debts; and after some specific devises of real estate, he gave all other his real estate upon trust that the trustees should receive the rents during twenty-one years from his death, to be dealt with upon certain trusts, and subject thereto in trust for *James St. Aubyn*, the Petitioner, for life, remainder to the first and other sons of the body of *James St. Aubyn*, remainder to *Edward St. Aubyn*, one of the parties to the suit, for life, remainder to the Plaintiff *John St. Aubyn*, eldest son of *Edward St. Aubyn*, for life, with remainder over. The will contained powers to the trustees to lease and improve, by building or repairing, and to open mines and grant mining leases.


The trusts declared of the term of twenty-one years were to pay debts, legacies and annuities, and for other purposes, and subject thereto, to accumulate the rents.

The testator died on the 10th of August, 1839, so that the term of twenty-one years expired on the 10th August, 1860, and on that day the Petitioner's life estate commenced.

The trustees had granted ordinary leases, with rents reserved, at the usual fixed periods; and also mining leases at royalties, payable at fixed periods after the raising of the minerals.

The petition was for the appointment of new trustees, and other general purposes; but the principal questions argued were:—1st. Whether the rents due at Michaelmas, 1860, were apportionable between the trustees of

the term of twenty-one years and the Petitioner, the first tenant for life; 2nd. Whether the royalties for minerals raised were apportionable.

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Mr. *Jessell* and Mr. *Smart*, for the Petitioner, contended that there was no apportionment; that, firstly, the Apportionment Act, 4 & 5 Will. 4, c. 22, did not apply to the case of the determination of a preceding interest, by the expiration of a term; secondly, that if it did, accumulation beyond the 10th August, would bring the case within the *Thellusson* Act. As to the royalties, the Apportionment Act could not apply, as that act related only to payment of rent at stated periods.

Mr. *Baily* and Mr. *Bathurst* for the Plaintiffs.

Mr. *Glasse* and Mr. *Druce*, for parties interested in the accumulation, contended that the Apportionment Act applied; that its language implied termination of the antecedent interest by any means whatever, as much by the expiration of a term as by the event of death; that though the royalties were not reserved on a fixed day, they were reserved in respect of minerals raised down to the expiration of the term, and they fell within the principle of the act; and that as to the *Thellusson* Act, it could have no application, because the accumulation would cease by the very will itself at the expiration of the term; the Michaelmas rents could not be accumulated, and all that they claimed was the proportion of the unaccumulated Michaelmas rents.

Mr. *Greene* and Mr. *Jones Bateman* for the trustees.

Mr. *Jessell* replied.

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*Shipperton v. Tower* (a); *Campbell v. Campbell* (b);  
*Knight v. Boughton* (c); *Plummer v. Whiteley* (d);  
and the *Apportionment Act* and the 39 & 40 *Geo. 3*,  
c. 98 (the *Thellusson Act*), were cited.

The VICE-CHANCELLOR :

The first question raised here is of a peculiar and novel character. The cases of *Campbell v. Campbell* and *Shipperton v. Tower* seem to be beside the point, and I must consider this to be a new question to be determined now for the first time. It is this, the testator having directed that for a period of twenty-one years next after his death the trustees should receive and accumulate the rents and profits of his estate, and apply them towards paying debts and legacies, and incumbrances; and subject to that term, having given the beneficial interest in the income of his estate to Mr. *St. Aubyn* during his life, the question is, whether the rent, which fell due next after the expiration of the twenty-one years, is to be apportioned between those beneficially interested in the accumulation and the tenant for life, who was entitled subject to the term, and therefore entitled upon the expiration of that term. In order to simplify the matter, I will first consider it as if the will had given a term to trustees in trust to pay the rents and profits to A., his executors, administrators or assigns for the term, and after the expiration of the term, then B. to have the income during his life: that is putting a very simple case; and then the question is, whether the half year's rent which was accruing due at the time when the term expired, but did not actually become due till after the expiration of the term, belongs

(a) 8 Jur. 485.

(b) 7 Beav. 482.

(c) 12 Beav. 312.

(d) Johns. 585.

entirely to the person who is entitled subject to and after the term; or whether it is to be apportioned between the person entitled to the rents during the term and the person entitled subject to and after the term? Now, of course the question depends on the construction which is to be put on the language of the Apportionment Act; and, as has been observed more than once, the language of that act is, like the language of many other acts, not so explicit as it might be. The preamble, after referring to the act of *George II.*, which created apportionments in a very limited class of cases, and referring to the expediency of making that provision more extensive, goes on thus:—"And whereas by law the rents, annuities, and other payments, due at fixed or stated periods, are unapportionable, unless express provision be made for the purpose, from which it often happens that persons and their representatives whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment thereof arrives, are deprived of means to satisfy just demands, and other evils arise from such rents, annuities and other payments being unapportionable, which evils require remedy: be it therefore enacted and declared," and so on. Then it proceeds in that section merely to make the provisions of the act of *George II.* apply in a much more extended way than they would have applied under the former act. Then follows the second section, on which the argument mainly turns. But with respect to the preamble, although I cannot help concurring in the observation, that in the former part of the passage which I have just read, the legislature in speaking of the inconvenience and practical mischief arising out of the existing state of things, by reason of rents and annuities not being apportionable, seems to have had in view more

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particularly the case of a person dying in the interval between two successive times for payment ; yet, I think that that was not the only case to which the act meant to refer ; but that besides that evil and mischief, it contemplates other evils and mischiefs ; because the latter part of the clause is, “and other evils arise from such rents, annuities and other payments not being apportionable, which evils require remedy.” Although the former part of the sentence would seem rather to point to cases in which certain interests might be determinable by death, still, taking the whole preamble together, it does not appear to me that that particular class of cases is all that was within the contemplation of the legislature ; but in every case in which the interest of a person might come to an end or determine during the currency of a half year or other period of time, at the end of which a certain amount would become payable, the legislature meant the principle of apportionment to apply. But whatever reason there might be to give a more limited construction to the preamble, this I apprehend to be a rule, that if the preamble would tend to a limited view, and that is followed by an enactment which clearly and explicitly, and according to the fair interpretation of its terms, has a more extended scope and effect than would be gathered from the mere effect of the preamble, the enacting part must have its full effect, and is not to be cramped and cut down, and limited, by the terms of the preamble. Now the language of the second section, upon which this question mainly turns, does not appear to me to be reasonably open to doubt or difficulty ; and in my opinion the natural construction of that language leads to the conclusion, that the legislature did not mean to limit the operation of the act to that class of cases to which reference has been made, but meant it to be universal.

The language is this:—"That from and after the passing of this act, all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of *Great Britain and Ireland*, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a written testamentary instrument) that shall come into operation as and in such manner that on the death of any persons interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office or benefice from or in respect of which the same shall be issuing or derived" (that is on the death of any person), then comes the alternative, "or on the determination by any other means whatever of the interest of any such person, he or she and his or her executors, administrators or assigns shall be entitled to a proportion of such rents," and so on. And then it goes on to describe the details of the mode of apportionment. Now it appears to me, although one might wish the language was more explicit, that the fair construction of it is this: that the legislature contemplated that the interest of a person might determine, that is, come to an end, in one or other of two ways. It might come to an end by death, which is, of course, an uncertain event as to the period of its occurrence; or it might come to an end by any other means, that is, in any other mode whatever. It has indeed been very ingeniously argued, that the word "means" has a special significance,—that it does not mean, "in any other way," but that it imports some

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agency in operation,—something occurring which is not consistent with the idea of its coming to an end by the natural effluxion of a period prescribed. I cannot say I think that a construction, depending upon so very subtle a criticism upon a word, would be a satisfactory or useful mode of construing an Act of Parliament. It is much better to construe an Act of Parliament, or indeed any other instrument, according to the fair, natural and ordinary use of the words, although I do not mean to say that, where a term has a fixed legal signification, that is not to prevail over a mere loose popular signification. Here the words are “by any means whatever,” that is, in any way or mode whatever. That is the fair meaning of the expression. Another equally ingenious argument has been offered on the word “determination.” It is said that “termination” and “determination” do not mean the same thing; that “termination” means the thing coming to its natural end; “determination” means coming to what I may call a violent end, that is, an end which was not contemplated as the longest duration, such as coming to an end by an unexpected death. I do not think that this is either the popular or the legal distinction between the two terms. Supposing a term were created of fifty years, determinable at the death of A., would it be legally inappropriate to say, that such term is determinable either by effluxion of time or by the death of A.? And as to the grammatical or popular use of the term, it is rather remarkable that, in *Todd's* edition of *Johnson's* Dictionary, the fourth sense given of the word “determination” is “expiration,”—“end.” And the lexicographer adds, “*Used* only by lawyers; as, from and after the *determination* of the said lease.” The word “determination” may properly, and according to legal as well as to ordinary use, signify the coming to

an end in any way whatever. That appears to me to be the honest mode of construing the word. And when the legislature says, that either on the death of the person interested, or on the determination *by any other means whatsoever* of the interest of such person, there shall be an apportionment, why should I except out of that generality the particular case of a term of years coming to an end by effluxion of time? If, therefore, the rents during the term were to belong to A., and subject to and after the term, the rents were to belong to B., it appears to me that, that is a case in which an apportionment was intended by the act to take place. And if so, I think it is impossible to draw the line between that simple case and the present, a case in which during the term the rents are not payable to a single person, but are to be accumulated, and that accumulated fund is to be applied in paying debts and legacies, and charges of various kinds which the testator had created, or which were existing upon his estates. It can make no difference whether one person only or whether several persons are to benefit, by the application of the rents and profits during the term.

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The next question is with reference, not to the ordinary rents, but to a certain peculiar species of rent or royalty which is reserved upon mining letts. It appears that those mining letts consist, not of leases of the mines, or of the soil, but they are grants of licences to work the mines, giving no interest in the soil to the grantees, except the right to work and draw the ore out of the soil; and the rent or royalty is reserved in this way: the grantees are, within two months after they have sold the produce of the mines (which they shall have first manufactured into a



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marketable article), to pay a certain royalty or rent (it matters not which term you use); they are to pay a certain amount or proportion to the grantor of the licence. And the question is, whether that is a rent, or annuity or other payment made payable or becoming due at *fixed periods*? I think clearly not. Fixed periods mean, certain definite periods prescribed and pointed out by the instrument; such, for example, as the usual quarter days, or half-yearly days; but when the times of payment are altogether indefinite, depending not upon anything prescribed by the lease or lett, but only upon the will and pleasure of the party who is to make the payment, it appears to me that that is not a case within the terms "made payable or becoming due at *fixed periods*." I suppose in all cases the royalties, which would be payable under that reservation, would exceed the 5*l.* a year which is reserved. If in any case the royalties were less than the 5*l.* a year, then of course the rent of 5*l.* a year, being payable within fixed periods, would come within that clause.

The next question arises under the *Thellusson Act*. It is contended that to decide in favor of an apportionment in this case, would be a violation of the provisions of that act, because the rent which is sought to be apportioned does not fall due till after the expiration of the twenty-one years; and therefore if the apportioned part is to be included in the accumulation, there will be an accumulation after the expiration of the twenty-one years. In my opinion this objection cannot prevail. By the operation of the Apportionment Act, the portion of the half-year's or quarter's rent, which is apportioned to the period falling within the twenty-one years, is made to belong to the persons entitled to the benefit of the term, in the same manner

as if it accrued at the moment of the expiration, although, as regards the tenant liable to pay the rent, it does not accrue due till the end of the current half-year or quarter.

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The effect on the whole is, that there will be apportionment as to the rents payable at fixed times; but that as to the royalties reserved on the mining letts, there will be no apportionment, because they are not payable at fixed periods.

Dec. 3.  
15 & 16 Vict.  
c. 86, s. 52.  
*Transmission of  
Interest.  
Supplemental  
Bill.*

GUILLON v. ROTCH.


**THIS** suit was instituted to establish the right of the Plaintiffs to certain shares in patent rights. A decree had been made declaring the Plaintiffs entitled to a transfer of the shares, and ordering payment to them of sums of money in Court arising from profits or dividends of the shares.

After decree *Guillon*, one of the Plaintiffs, was convicted, *par contumace*, before the Court of Assizes of the *Seine*, in *France*, of embezzlement and forgery, and by reason of such conviction he became, under the Criminal Code of *France*, divested of civil rights.

A Family Council (*Conseil de Famille*) was constituted, transmission of interest as would come within the 52nd section of the Chancery Amendment Act, and that it was necessary to file a supplemental bill.

Vol. I—5.

A Plaintiff in a suit was convicted by a foreign court of felony, and a curator had been appointed of his estate, who, in accordance with the law of such foreign country, by virtue of his office, fully represented him. Held, upon motion for a supplemental order, that there was no such  
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according to French law and practice, before the *Juge de Paix*, and under those proceedings a curator was appointed, in whom, by French law, the rights of *Guillon* became vested, and he was by virtue of his office competent to sue and be sued as representative of *Guillon*.

Application had been made to the registrar for an order, in the nature of a supplemental decree, against the curator of *Guillon*, but the registrar had declined to make the order without the sanction of the Court.

Mr. *Prendergast* now moved that the registrar might be directed to make the common order to revive, in accordance with the 52nd section of the Chancery Amendment Act (15 & 16 Vict. c. 86).

The VICE-CHANCELLOR took time to consider, and then decided that the case was not such a clear transmission of interest as to come within the Chancery Amendment Act, and said that a supplemental bill must be filed.

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Dec. 13.

*Will.*  
*Abatement.*  
*Fixed Legacies.*  
*Residuc.*

HARLEY v. MOON.

**THIS** case came on upon a petition presented by *John Lindsey* for the payment out of Court of a sum of 121*l.*

By an indenture of settlement, dated the 3rd day of June, 1850, and made between *Katherine Eward*, widow, of the one part, and the Defendants *Alfred Moon* and *Francis Moon* of the other part, after reciting that *Katherine Eward* had two daughters by a former marriage then living, and that she had a grandchild then living with her named *Katherine Annastatia West Harley*, it was declared that *Alfred* and *Francis Moon* should stand possessed of a sum of 600*l.*, part of a larger sum, upon trust to invest the same and pay the income to *Katherine Eward* and her assigns during her life, "and after her decease as to both the principal and the income thereof in trust for all and every or such one or more of the issue, whether children, grandchildren or remoter issue, of the said *Katherine Eward* living at her decease, in such manner and form in every respect as the said *Katherine Eward* should by any deed, will or codicil appoint," and in default of any appointment then to pay the principal in the manner in the same indenture mentioned.

*Katherine Eward* by her will, dated the 27th of [blank], gave the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that therefore the legacies to the daughters must be paid in priority, and were not liable to abate *pari passu* with the residue.

Where a testatrix appointed 600*l.* to a trustee upon trust to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient: Held, that the

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September, 1850 (after reciting the indenture), in pursuance of the power therein contained, directed and appointed that the trustees of the said indenture should, upon her decease, call in and convert into money such part or parts of the said sum of 600*l.* as should not consist of money, and after payment thereof of all her just debts, funeral and testamentary expenses pay to her daughter *Katherine Annastatia*, the wife of the said *George Sams*, the sum of 75*l.*, and to her said daughter *Margaret Eliza*, the wife of the said *John Barritt*, the sum of 75*l.*, and the residue of the said sum of 600*l.* she directed and appointed that the said trustees should pay to her friend *Samuel Gannon*, and his executors or administrators, who should stand possessed thereof upon trust to invest the same and pay and apply the dividends and interest to or for the benefit of her granddaughter *Katherine Annastatia West Harley*, as he might think best, till she attained seventeen, at which time she directed *Samuel Gannon* to pay the further sum of 100*l.* out of the sum which might be then in his hands to each of her said daughters, *Katherine Annastatia Sams* and *Margaret Eliza Barritt*, and to stand possessed of the residue thereof and to invest the same and apply the income for the benefit of her granddaughter *Katherine Annastatia West Harley* until she should attain twenty-one, and then to pay the principal to her said granddaughter for her own absolute use and benefit.

The testatrix *Katherine Eward* died in November, 1850.

The two legacies of 75*l.* each to the testatrix's daughters were duly paid, and the two daughters and their husbands sold two sums of 80*l.*, parts of the two

legacies of 100*l.* each payable to them on the granddaughters attaining seventeen, to *John Lindsey* the Petitioner for 64*l.*, and by an indenture dated in February, 1852, assigned them to him, and notice of this assignment was served on the trustee's solicitors.

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The suit of *Harley v. Moon* having been instituted by the granddaughter for the administration of the trusts of the indenture of settlement and will of *Katherine Eward*, the sum of 376*l.* 6*s.*, being the residue of the sum of 600*l.*, was paid into Court, and this sum had since been reduced by payment of certain costs thereout to 121*l.* 3*s.* 3*d.*

The granddaughter attained seventeen in February, 1861. *John Lindsey*, though served with notice of the hearing on further consideration, did not appear, under the impression that he was not entitled to do so.

The sums of 20*l.* and 20*l.*, being the residue of the said two legacies of 100*l.*, after paying the 80*l.* and 80*l.* so assigned to *John Lindsey*, were subsequently assigned to *Samuel Gannon*, one of the Defendants.

*John Lindsey* now presented the present petition, praying that the fund in Court might be paid to him in satisfaction of the two sums of 80*l.* each, parts of the legacies of 100*l.* each, which had been so assigned to him.

Mr. *Everitt*, for the Petitioner *Lindsey*, who was the assignee of the daughters' legacies, contended that the gift of the residue was not a gift of a fixed sum, but of whatever might be left after payment of the legacies of

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specified amount, and therefore that the legacies must be paid in priority, and did not abate with the residue.

Mr. *Bazalgette*, for the granddaughter, contended that the intention of the testatrix clearly was to give the residue just as specifically as the aliquot parts, and the fund being insufficient, there must be an abatement of the specific sums as well as of the residue. He cited *Page v. Leapingwell* (a); *Hazlewood v. Green* (b); *Wright v. Weston* (c); *Cowx v. Foster* (d); *Bullock v. Thomas* (e).

Mr. *Charles Browne* for *Samuel Gannon*, in the same interest.

Mr. *Everitt*, in reply, referred to *Petre v. Petre* (f); *Vivian v. Mortlock* (g); *Booth v. Alington* (h); *Attorney-General v. Dean and Canon of Windsor* (i).

#### THE VICE-CHANCELLOR.

The question is one of intention, which must be collected from the whole instrument.

The testatrix was dealing with a sum of 600*l.*, of which she had the power to dispose; and she was aware that it might be invested in such a way as not to produce eventually 600*l.*; but it happened that the sum at the time of her death was exactly 600*l.*

If a testatrix has power to dispose of a definite sum,

(a) 18 Ves. 463.

(b) 28 Beav. 1.

(c) 26 Beav. 429.

(d) 1 Johns. & H. 30.

(e) 9 Sim. 634.

(f) 14 Beav. 197.


(g) 21 Beav. 252.

(h) 3 De G., M. & G. 613.

(i) 8 Clarke's H. of Lords' Cas. 369.

for example, 600*l.*, and says I give 100*l.* to A. and 100*l.* to B. and *the remaining* 400*l.* to C., of course the sum of 400*l.* is given just as specifically to C. as the two sums of 100*l.* each are given to A. and B. If instead of using that language the testatrix says, I give 100*l.* each to A. and B., and the remainder I give to C., without specifying the amount of the remainder, the Court has held that in the absence of anything showing a different intention, that the intention was to give the residue as a specific sum to C., just as specifically as the gifts to A. and B. That is the case of *Page v. Leapingwell*, in which the Court considered that the intention was to give to each legatee a definite portion of the fund; and in such case, if the fund by reason of costs or otherwise becomes diminished, each legatee must bear a due proportion of the loss.

In the present case the testatrix appears to me, in giving the remainder of the fund to the granddaughter, not to have intended to give her specifically an aliquot part of the fund, for this reason, that she has (although she had no right to do so), directed that the fund should be applied in payment of her debts, and if her intention had been carried out there would not have remained a definite aliquot part of 600*l.* for the benefit of the granddaughter, after the payment of the particular legacies to the two daughters. Notwithstanding her intention to diminish the fund by the payment of her debts, she still intended that each of her daughters should have a sum of 75*l.* immediately, and a further sum of 100*l.* at a future period, and that any diminution which might arise from the payment of her debts, was according to her intention to fall, not upon the legacies to the daughters, but upon the residue which was the subject of the trusts in favor of her granddaughter.

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*Winding-up  
Acts.*

*Petition for  
Re-hearing.*  
12 & 13 Vict.  
c. 108, s. 33.

*In re* ANGLO-CALIFORNIAN GOLD MINING  
COMPANY.

The 33rd section of the Winding-up Act of 1849 (12 & 13 Vict. c. 108), limiting a period of three weeks within which re-hearings are to be moved for, applies only to proceedings under a winding-up order, and not to the re-hearing of the winding-up order itself.

An order concurred in for a voluntary winding-up under the Winding-up Acts of 1856 and 1857 is not binding as a consent order upon contributories who were not parties to such order.

**THIS** was a petition presented by two contributories of the *Anglo-Californian Gold Mining Company*, praying that an order made on the original petition for the voluntary winding-up might be discharged or varied, or the petition reheard. It appeared that a compulsory winding-up order was made on the 24th of March, 1859, and proceedings were taken in Chambers under that order; but subsequently an arrangement had been entered into for the voluntary winding-up of the affairs of the company under the acts of 1856 and 1857, and an order was accordingly made under those acts for the voluntary winding-up.

Upon the petition coming on to be heard four preliminary objections were taken: 1st. That the order now sought to be discharged having been made by consent could not now be disturbed. 2nd. That the present Petitioners were no parties to that order, and therefore could not be heard to impeach it. 3rd. That under the 33rd section of the Winding-up Act of 1849 (12 & 13 Vict. c. 108), no notice of motion for rehearing any order of the Master of the Rolls or Vice-Chancellor could be given after the expiration of twenty-one days from the date of the order. And 4th. That no application to rehear any order could be made without leave having been obtained for that purpose.

Mr. Glasse and Mr. H. Stevens in support of the

objections, referred to *Sanderson's Case* (a) ; *Berry v. The Attorney-General* (b).

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Mr. *W. H. Bagshawe*, for other parties, supported the objections.

Mr. *Baily*, for the original Petitioner, took no part in the argument.

Mr. *Ellis* and Mr. *Roxburgh*, in support of the present petition and against the objections, cited *Gwynne v. Edwards* (c) ; *Urquhart v. Urquhart* (d) ; *Re Ipswich, Norwich and Yarmouth Railway Company* (e) ; *Re Direct Exeter Railway Company* (f).

Mr. *Glasse* in reply.

The VICE-CHANCELLOR.

Four preliminary objections have been taken to this petition which are quite independent of the merits.

The first objection is that the order which it is sought to discharge is a consent order, and that therefore the Court will not discharge it upon the present petition. It appears that while the original petition for winding-up the company was pending, the solicitors, representing the liquidators and also the company as a company, and the solicitors representing the then Petitioners, drew up the form of an order, to which they thought fit to consent, and upon that consent the order was made. And it is contended that the consent so given binds all

(a) 3 De G. & Sm. 66.

(b) 2 M. & G. 16.

(c) 9 Beav. 22.

(d) 13 Sim. 613.

(e) 1 De G. & Sm. 744.

(f) 2 De G., M. & G. 665.

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the contributories. It is quite impossible to hold that the present Petitioners can be bound on the ground that the order was made by consent of the solicitor for the company. The parties who gave such consent may be bound, but it cannot bind the present Petitioners who never consented to it.

The 2nd objection is, that the present Petitioners were no parties to the order. No doubt they were not parties as being Petitioners or Respondents when the order was made. But they are parties to it in this sense, that it is an order which, as long as it stands, affects the present Petitioners and all the other persons who were shareholders in the company, and the Petitioners must have a right to make an application to discharge or vary it.

The 3rd objection raised is one as to time, it being contended that the present petition is presented too late. It is contended that there is a statutory bar to the Court entertaining the matter by reason of the petition not being presented within three weeks after the order, which it seeks to discharge, was made.

Under the Joint Stock Companies Winding-up Act of 1848 (a), all proceedings under a winding-up order, were taken in the Master's Office; and after the Court had once made the winding-up order, it had nothing further to do with the matter, except by way of appeal from the Master. And by the 99th section of that act it was provided, that an appeal should lie from the Master to the Lord Chancellor, or the Master of the Rolls upon motion, and fourteen days was allowed within which to appeal. By the 33rd section of the act of 1849 (b), it

(a) 11 & 12 Vict. c. 45. (b) 12 & 13 Vict. c. 108.

was provided, that no notice of motion for a rehearing before the Lord Chancellor of any order of the Master of the Rolls or any Vice-Chancellor should be given after the expiration of three weeks from the time when the order complained of was made. Although the present case arises under the acts of 1856 and 1857 (a), the practice remains the same as it was under the acts of 1848 and 1849.

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The question is whether the 33rd section of the act of 1848 applies to the case of a rehearing of an original winding-up order. In my opinion it does not, but it applies only to the rehearing of orders made by the Master of the Rolls, or a Vice-Chancellor on an appeal from the Master.

No case has occurred in which, upon an application to discharge or vary an order for the winding-up of the company, the Court has dismissed the application on the ground that it has not been made within three weeks, although such applications must frequently have been made; and this shows that the view which the Court has taken of the 33rd section of the act is that, although it applied to proceedings under the winding-up order, it did not apply to the winding-up order itself.

If a contrary construction had been put on the acts, and the period of three weeks had been held to apply to petitions to discharge or vary a winding-up order, very great hardship and injustice would result, as generally a large portion of the shareholders never even hear of the winding-up order till long after it has been

(a) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 78.

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made. I am satisfied that ever since these acts were passed, the view of the Court has been that the statutory bar was not intended to apply to applications like the present. The object was to expedite the proceedings under the winding-up order; and there was a tendency to fix short periods, and the three weeks was fixed for the rehearing of orders made on appeals from the Masters.

With regard to the fourth objection, that leave to rehear should have been applied for, the case of *Berry v. Attorney-General* (a), was cited; but that being the case of a suit, there is no analogy between that and the present case. I see no reason why a shareholder should not be able to come to the Court to vary and discharge the winding-up order, without applying for leave to rehear.

The objections therefore must be overruled.

(a) 2 Mac. & Gor. 16.

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AN  
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THE PRINCIPAL MATTERS.

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**ABATEMENT.**

Where a testatrix apportioned 600*l.* to a trustee, upon trust to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use, and the fund had been diminished by certain costs and was insufficient: Held, that the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that, therefore, the legacies to the daughters must be paid in priority, and were not liable to abate *pari passu* with the residue. [*Harley v. Moon*] . 623

**ACCOUNT.**

Where a Defendant, who was the sur-

viving partner in a firm of commission wine merchants, being required to set out in his answer an account of the partnership assets, liabilities and dealings for the six months preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the Plaintiff excepted for insufficiency, the Court allowed the exception, and held, that the Defendant ought to have set out the account in a schedule to his answer, and that the objection that the names of the customers were privileged did not apply to such a case. [*Telford v. Ruskin*] . . . . . 148

**ACKNOWLEDGMENT.**

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor. Acknowledgment of a debt contained in a letter from one partner to another, under-

taking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter, and others, or "obtaining a release of any liabilities in respect of such debts:" Held, not to amount to a promise to pay the debts, and therefore not to take the debts out of the Statute of Limitations. [*In re Hindmarsh*] . . . . . 129

### ACTION AT LAW AGAINST SHERIFF.

The Court of Chancery exercises a discretion in permitting actions at law to proceed, but it will never permit its decisions to be questioned in a court of law. Therefore, where an action of trover was brought against a sheriff for an ejectment under a writ of assistance issued in pursuance of an order of the Court, an injunction was granted restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order. [*Walker v. Micklethwait*] . . . . . 49

### ACTS OF PARLIAMENT.

A company incorporated by act of parliament cannot exercise its powers or apply its capital except in strict conformity with the act. An act of parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing; and therefore a railway company with the ordinary powers was restrained from carrying on the business of coal merchants at the suit of the Attorney-General on the relation of a stranger to the company. The 7 & 8 Vict. c. 85,

ss. 16, 17, and the 17 & 18 Vict. c. 31, do not take away the jurisdiction of the Court or of the Attorney-General. [*Attorney-General v. Great Northern Railway Company*] . . . . . 154

### ADMINISTRATION SUMMONS.

1. The Court has no authority under the 7th rule of the 10th Consolidated Order to order the service abroad of an administration summons. [*Lester v. Bond*] . . . 392
2. Where a bill was filed for the administration of the testator's estate, and sought to charge the representative of the testator's executrix on the balance of an account, and such representative had offered to pay a sum in full but had refused to account, and there was a question on the construction of the will to be decided: Held, that the suit was properly instituted by bill, and that the case was not one for an administration summons under the 45th section of the 15 & 16 Vict. c. 86, and therefore that the Plaintiff was entitled to his costs. [*Smith v. Spilsbury*] . . . . . 151

### ADMITTANCE OF PARTICULAR DEVISEE.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested or by contingent remainder, or executory devise, which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord of the manor, he is entitled to the benefit of the admittance of the first devisee under the will. The Court will not allow the possession of a receiver appointed by the Court to

be disturbed without the leave of the Court. [*Randfield v. Randfield*]

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### AFFIDAVIT IN SUPPORT.

Where a defendant to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel, and that the plaintiff's patent was invalid, the Court, on a motion by the plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction or to give leave to bring an action, unless he produced a clear and distinct affidavit that the invention was novel and the patent valid, but allowed the motion to stand over for that purpose. [*Whitton v. Jennings*] . . . . . 110

### ALTERNATIVE GIFT.

Gift of aliquot parts of a fund to the children of A., the children of B., the children of C. and the grandchildren of D. Provided that if any child or children of A. or B. or C. or any of the grandchildren of D. shall die in my lifetime, leaving a child or children living at my decease, and attaining twenty-one, the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his or their deceased parent or respective parents, and be entitled to the same share or shares which his, her or their deceased parent would have been entitled to if living at my decease: Held, 1. The word "children" could not be read grandchildren, so as to let in as original donee the child of

a deceased child of a person who never had a child living at the date of the will. 2. The words "shall die" do not import future dying, but are equivalent to "shall be dead," or "shall have died."

3. A testator may so express himself as to cause a child of a deceased child to represent and be substituted for that deceased child, though he never intended a share for the deceased child; and Held, that in this case the proviso was large enough to show an intention that the child of a child deceased at the date of the will, and for whom therefore no share was intended, should represent or be substituted for that deceased child, and take the share which, if living at the date of the testator's death, the deceased child would have taken. [*Christopherson v. Naylor* and other cases of that class distinguished, and *Waugh v. Waugh*, disapproved and overruled. [*Loring v. Thomas*] 497

### AMALGAMATION.

The directors of a company transferred all its assets and liabilities and business to another company, under a deed of amalgamation, by which it was provided that the shareholders in the old company should exchange their shares for shares in the new company, and that the new company should indemnify the old company in respect of all its debts and liabilities. Some only of the shareholders in the old company executed the deed of amalgamation, and became shareholders in the new company. The new company disputed their liability to carry out the arrangement for the amalgamation, and did not pay the debts of the old company. The new com-



pany subsequently assigned the business, but not their assets, to another company. Upon a petition for the winding-up of the old company presented by a shareholder in the new company, who had originally been a shareholder in the old company, and which was supported by the shareholders of the old company who had executed the deed of amalgamation, but opposed by those who had not, the Court refused to order the old company to be wound up, and dismissed the petition with costs as against those shareholders who had been served, but without costs as against those shareholders who had voluntarily appeared. A shareholder in the new company gave notice to a third company to whom the new company had assigned its business, not to pay certain monies due from them to the new company, in consequence of which litigation ensued. The shareholder then presented his petition to wind up the new company: Held, that the existence of suits against the company was not per se proof of its insolvency, and the petition was ordered to stand over, with liberty to apply. [*In re The Anglo-Australian and Universal Family Life Assurance Company, Ex parte Smith. In re The British Provident Life and Fire Assurance Society, Ex parte Collins. In re The Winding-up Acts, 1848 and 1849*] . . . . . 113

#### ANCIENT LIGHTS.

The principle as to ancient lights is that the owner of the dominant tenement cannot depart from the mode of user substantially. He cannot change the position of his lights to increase the original aperture into which windows have been

put; but if he has, in using his right, contracted, to any given extent, the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows by windows of an improved structure that let in more light and air. [*Turner v. Spooner*] . . . . . 467

Where a landlord who had granted a lease of certain premises, including ancient lights and appurtenances, to A., in consideration of certain improvements which had been made by A. in the premises leased, which improvements included new lights, granted a lease of the adjoining premises to B., and B. was building so as to block up the lights of A. Upon bill by A. for injunction: Held, that the landlord could not have blocked up such lights, and that his lessee B. could stand in no better position, and the Court granted an injunction as against B. If a person having ancient lights which he is entitled to have protected puts in new lights on the same side of the building, he has no right to any protection in respect of such new lights, and the owner of the contiguous premises may build up any structure obstructing the light to such new lights, even though in so doing he necessarily interferes with the ancient light. *Betts v. Clifford*, 1 John. & Hem. 74, commented on. [*Davies v. Marshall, No. 1*] 557

#### ANCIENT LIGHTS, ALTERATION OF.

A Court of Equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property, and the jurisdiction of the Court is not confined

to restraining injury to the enjoyment and comfort in the occupation: therefore, it is not necessary that a Plaintiff filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property. Where a Plaintiff filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with his windows, which he alleged were ancient lights, some of which had been recently enlarged, and some new lights had been opened, and an interim order had been granted. Upon a motion for an injunction, the Court gave the Plaintiff liberty to bring an action at law, but allowed the Defendant to proceed with the new building to a specified height on his undertaking to abide by any order the Court might make as to pulling down any addition which might be made to the erection complained of by the bill, and also undertaking to admit at the trial that the erection had been carried to such specified height. Form of order. The case of *Renshaw v. Bean* (18 Q. B. 112) commented on. [*Wilson v. Townend*] . . . . . 324

#### ANNUITY.

A testator gave to his son all his furniture, plate, &c. and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease, and in a subsequent part of the will he bequeathed to his trustees "all my property as well real and personal or mixed not hereinbefore disposed of:" Held, that although the words "goods and chattels" might, if unrestrained by the subsequent part of the will, have Vol. I.

constituted a residuary bequest, yet that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary. The testator also gave a legacy of 500*l.* £3 per Cent. Consols or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as that amount of stock would have been worth at his decease; and by a subsequent clause the testator gave another legacy of like stock to the same person "in addition to the legacy already given" to be raised out of the proceeds of his residuary estate: Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general. Distinction between specific, demonstrative and general legacies. An annuity is included under the term "legacy." [*Mullins v. Smith*]

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#### ANSWER.

Rules of practice as to a Defendant reading his own answer; or the answer of a co-Defendant on motion for a decree. [*Stephens v. Heathcote*] . . . . . 138

#### APPEAL.

The stay of proceedings pending an appeal is in the discretion of the Court. Where the Court has no judicial doubt upon the decree, it will not in general stay proceedings. But where an order was made for payment of a large sum to A., and it was in evidence that A. had heavily encumbered his interest, and part of the decree was made in conformity with the

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decision of a Scotch Court, on a case sent to it as to which the Court could form no judicial opinion, stay of proceedings was ordered pending an appeal. [*Lord v. Colvin*] . . . . . 475

### APPEARANCE.

The Court will not upon the question whether an appearance shall be entered for a Defendant enter into the question of jurisdiction. Therefore, where a Plaintiff moved for leave to enter an appearance for the Defendant, her Majesty's secretary of state for war, and the Defendant appeared on such motion under protest, and raised the question as to the jurisdiction of the Court upon a bill, submitting that the proper course would have been by petition of right, the Court refused to enter into the question of jurisdiction, and gave the Plaintiff leave to enter an appearance for the Defendant. [*Felkin v. Lord Herbert*] . . . . . 608

### APPORTIONMENT.

Interest payable on *coupons* to debentures, though payable half-yearly, accrues due *de die in diem*, and is therefore subject to apportionment. [*In re Roger's Trusts*] 338

### APPORTIONMENT ACT.

The Apportionment Act applies to the case of the expiration of a term in trustees to accumulate rents for payment of debts, legacies and other charges, with remainder to a tenant for life, as well as to the common case of an estate for life to A., remainder to B. And the term being for twenty-one years from the testator's death, the *Thellusson* Act does not apply to prevent apportionment. But

the Apportionment Act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine. [*St. Aubyn v. St. Aubyn*] . . . 611

### ARREARS.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot in foreclosing have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears; and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*] . . . . . 412

### ARREARS AND FUTURE PAYMENTS OF ANNUITY.

Where an annuity was given to an executrix, who was a married woman, to her separate use without power of anticipation, and such executrix had misappropriated assets of the testatrix: Upon a suit for the administration of the testatrix's estate, the Court held, that in taking the accounts, payments of the annuity, which were in arrear, were liable to be applied to make good the executrix's misappropriations, but that the future payments being subject to the restraint on anticipation, were not so liable. [*Pemberton v. M'Gill*]

### ARREARS OF ANNUITY, RIGHT TO RECOVER.

A testator devised his real and personal estate to trustees (of whom his wife was one) upon trust for conversion, and to invest in government or real securities, and that his trustees should stand possessed of the trust premises to pay his wife an annuity of 100*l.* clear of all deductions whatsoever, and directed the trustees to appropriate and set apart a fund for securing such annuity, and after the death of his wife directed the trustees to pay and divide or transfer the money thereinbefore appropriated and directed to be set apart among his (the testator's) children. Part of testator's property consisted of 2,500*l.* £4 per cent. Stock, which at his death and for some time after produced 100*l.* a-year: this fund was set apart by the trustees for securing payment of the widow's annuity, but owing to successive reductions of the interest of the stock by parliament there was at the widow's death a considerable arrear to make up the deficiency between the 100*l.* a-year and the reduced income of the fund which had for many years been received by the widow. Held, that on the construction of the will, the widow would have been entitled to have the deficiency made good out of the *corpus*; but that she, having foreborne to assert her claim for so long a period during her lifetime, and, having been aware of the dealings of several of her children in respect of their shares with persons who were acting on the belief that they were shares in a certain definite amount of stock, without giving any intimation of her intention to claim such arrears out of the *cor-*

*pus*, the representatives of the widow could not, as against the parties who so dealt for value with the knowledge of the widow, assert the claim to which she would otherwise have been entitled, to have the arrears of the annuity made good out of the *corpus*. [*Upton v. Vanner*] . . . 594

### ASSIGNEE.

Where a person entitled to a share in a fund in Court and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. In giving effect to the wife's equity to a settlement of a fund in Court, the rule of settling half on the wife is departed from, either where the fund is very small and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance. Where the fund settled by the Court has been assigned, the Court, after providing for the wife and her children, declares an ultimate trust, in case of the wife dying in the husband's lifetime without issue, in favour of the assignee. [*Ward v. Yates*] . 80

### ASSIGNMENT BY LETTER.

Where a *cestui que trust* by letter directed an executor to pay the share to which "I am entitled," or due to me, to three persons equally, and such letter was adopted and acted on by all parties. The writer having died: Held, that it is not necessary that an assignment, to be valid in equity, should be by deed, and therefore that such letter operated as an assignment of the whole share of the

*cestui que trust* in the testator's estate, whether immediately payable or in reversion. [*Lambe v. Orton*] . . . . . 125

#### ATTORNEY-GENERAL.

A company incorporated by act of parliament cannot exercise its powers or apply its capital except in strict conformity with the act. An act of parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing; and therefore a railway company, with the ordinary powers, was restrained from carrying on the business of coal merchants at the suit of the Attorney-General on the relation of a stranger to the company. The 7 & 8 Vict. cap. 85, sects. 16 and 17, and the 17 & 18 Vict. cap. 31, do not take away the jurisdiction of the Court or of the Attorney-General. [*Attorney-General v. Great Northern Railway Company*] . . . 154

#### BANKRUPT LAW CONSOLIDATION ACT, 1849, s. 130.

The Court will exercise its discretion as to whether it will order the removal of a trustee on the ground of bankruptcy, under the 130th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. cap. 106), and it is not sufficient merely to show the fact of bankruptcy to induce the Court to make such an order. Therefore where a trustee became bankrupt in 1855, and in 1856 obtained a first-class certificate, and had since been appointed to a position of trust, and in 1860 a petition was presented for his removal on the ground of his bankruptcy in 1855 and also on the ground of vexa-

tious conduct; but the petition did not allege that his continuing in the trust would endanger the trust property: Held, that it was not compulsory on the Court to make an order for the removal of such trustee, but that it had a discretion and dismissed the petition with costs. In all cases where jurisdiction is given to the Court by act of parliament by the words "it shall be lawful," those words unless they are controlled by other parts of the act, give the Court a discretion in the exercise of that jurisdiction. Charges of vexatious conduct as a ground for the removal of a trustee must be made by bill and not by petition. [*Re Bridgman*] . . . . . 164

#### BENEFIT BUILDING SOCIETY.

A society was formed, certified and inrolled as a benefit building society; its rules did not indicate an intention that it should act as a benefit freehold land society. The directors bought land, and mortgaged it to secure money borrowed for the purchase, and certain members, acting as trustees, covenanted to pay the mortgage debt, and under that covenant they had to pay money. It did not appear that every member acquiesced in, or was even cognizant of the transaction. Held, that the act of the directors and trustees was *ultra vires*, and the trustees could not compel contribution among the shareholders to recoup their loss. [*In re Kent Benefit Building Society*] . . . . 417

#### CALLS.

Where a testator takes shares in a company, any payments remaining due at, or becoming due after, his

death, which are necessary to constitute him a complete shareholder, must be paid by his general personal estate; but if he was a complete shareholder, payment of calls made after the testator's death, must be made by the specific legatee of the shares. [*Day v. Day*] . . . . . 261

### CHARITY COMMISSIONERS' CERTIFICATE.

When a final order has been made on a petition, it can no longer be said to be a matter "actually pending" for the purposes of the 16 & 17 Vict. c. 137, s. 17. Therefore where a petition was presented for the appointment of new trustees under a scheme ordered and settled by the Court, upon a petition presented in 1854, the Court required the certificate of the Charity Commissioners to such petition. [*Re Jarvis's Charity*] . 97

### COMPANY.

A company incorporated by act of parliament cannot exercise its powers, or apply its capital, except in strict conformity with the act. An act of parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing, and therefore a railway company with the ordinary powers was restrained from carrying on the business of coal merchants at the suit of the Attorney-General, on the relation of a stranger to the company. The 7 & 8 Vict. c. 85, sects. 16 and 17, and the 17 & 18 Vict. c. 31, do not take away the jurisdiction of the Court or of the Attorney-General. [*Attorney-General v. Great Northern Railway Company*] . . . 154

### COMPANIES.

When a company issues a prospectus, a person contracting to take shares on the statements therein contained has a right not only not to be misled by any statements actually false, but to be informed of all the facts, the knowledge of which might reasonably have deterred him from so contracting. And if the prospectus in that sense contains misrepresentations, or the absence of true representation, the contract will not be enforced. What concealment or ambiguity amounts to misrepresentation? Semble, that when a person contracts to take shares, but has not done specific acts necessary under an act of parliament to make him a shareholder at law, equity will enforce the contract, and compel him to do those acts. [*The New Brunswick and Canada Railway and Land Company v. Muggeridge*] . . . . . 363

### COMPROMISE.

The Court in directing a compromise under the 19th section of the 21 & 22 Vict. c. 60, exercises a judicial discretion, and will not direct the official liquidators to enter into a compromise without having the means of itself forming an opinion as to the propriety of the compromise. Therefore, where official liquidators applied to the Court to direct a compromise which had been proposed by a body of thirty-five shareholders in a company which was being wound up, to pay among them an aggregate sum in discharge of their liabilities as shareholders, but without disclosing to the Court the particulars or data of such compromise, the Court refused the application. It is in the discretion of the Court whether notice shall

be given to creditors under the 19th section of the 21 & 22 Vict. c. 60. [*In re Northumberland and Durham District Banking Company, Ex parte Tolly*]. . . 273

### CONDITION.

A testator bequeathed the residue of his estate to trustees, upon trust to transfer one moiety to his sister, and the other moiety to his three brothers, *Richard, James Jenkinson and John*, and directed that "should not my said brother *Richard Green*, who is supposed to be now alive and resident in *Australia*, make any claim to the shares and interests in the said several trust monies to which he may become entitled under this my will within the time or space of three years next after my decease," then the trustees were at the expiration of such three years to transfer "the shares and interests of the said *Richard Green*," unto his sister and two brothers, *James Jenkinson and John*, in equal shares. *Richard Green* died in the lifetime of the testator. Held, that *Richard Green's* share in the residue did not lapse by his death without claiming it, but that it passed by the gift over to the sister and two surviving brothers. [*Re Green's Estate*] . . . . . 68

### CONFIRMATION BY SHAREHOLDERS.

The clause contained in the 29th section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), requiring every contract or dealing in which a director is interested to be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, is not confined to contracts or dealings ejusdem generis with the con-

tracts referred to in the preceding clause of the same section, which merely incapacitates a director from voting respecting specified contracts in which he is interested, but includes an advance of money by a director to the company. The words "summoned for that purpose," apply to a special meeting, and not a general meeting of shareholders; but to give force to a contract as against the company, it is necessary not only that the question should be discussed, and even unanimously approved of by such a meeting, but that the terms of such contract should be submitted to, and be by resolution approved and confirmed, to give it validity. Therefore, where directors lent money to a company, and in a report, presented by the directors to the next general meeting of shareholders, was contained an item, "loans, 6,000*l.*," which item was discussed, and a report was approved and confirmed by the meeting, and a winding-up order was subsequently made against the company, the Court, upon a claim by one of the directors for the money so advanced by him to the company, disallowed the claim, holding that it was such a contract by a director with the company as was contemplated by the 7 & 8 Vict. c. 110, s. 29, and that the terms of such contract had not been approved and confirmed by a meeting of the shareholders as required by that section. But considering that it is competent for a director to advance money to carry on the business of the company, the Court held, that the director was entitled to establish a claim for so much of the money as had been properly applied for the purposes of the company. [*In re National Patent Steam Fuel Company, Baker's Case*] . . 55

CONSTRUCTION.

1. A testator bequeathed the residue of his estate to trustees upon trust to transfer one moiety to his sister and the other moiety to his three brothers *Richard, James Jenkinson and John*, and directed that "should not my said brother *Richard Green*, who is supposed to be now alive and resident in Australia, make any claim to the shares and interests in the said several trust monies to which he may become entitled under this my will, within the time or space of three years next after my decease;" then the trustees were, at the expiration of such three years, to transfer the shares and interests of the said *Richard Green* unto his sister and two brothers, *James Jenkinson and John*, in equal shares. *Richard* died in the lifetime of the testator. Held, that *Richard Green's* share in the residue did not lapse by his death without claiming it, but that it passed by the gift over to the sister and two surviving brothers. [*Re Green's Estate*] . . . 68
2. A gift of a life estate to a person who would be the testator's next of kin at his death, with remainder over to his next of kin, excluding some of the persons who would be some of his next of kin, does not exclude the donee of the life estate from taking under the gift to the next of kin. [*Lee v. Lee*] . . . 85
3. Testator limited real and personal estate to trustees for A. B. for life, with a limitation over in case he should thereafter become bankrupt or insolvent, &c., or if by his act or default the rents, &c., should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will. There was the usual power of attorney, and judgment was en-

tered up, but nothing further done, and the tenant for life did not in any manner alienate after the date of the will. Held, 1. That judgment without more only operated as an equitable charge, and did not vest the rents in or make them payable to the assignees. 2. That upon the authorities, and in particular *Manning v. Chambers*, the insolvency before the date of the will was within the words "shall thereafter become bankrupt," &c. [*Seymour v. Lucas*] . . . 177

4. A testator gave to his son all his furniture, plate, &c., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease; and in a subsequent part of the will he bequeathed to his trustees "all my property as well real and personal or mixed, not hereinbefore disposed of." Held, that although the words "goods and chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary. The testator also gave a legacy of 500*l.* £3 per cent. Consols or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as that amount of stock would have been worth at his decease, and by a subsequent clause the testator gave another legacy of like stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate. Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though ex-



pressed to be a substitute for the first legacy, was general. Distinction between specific, demonstrative and general legacies. An annuity is included under the term "legacy." [*Mullins v. Smith*]  
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5. A fund was devised by will to A. for life, and, after her decease, to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried. A. subsequently married and had eight children, but died a widow, and without having appointed the fund. Upon a petition by the children of A. claiming the fund: Held, that "unmarried" meant not having a husband at the time of her death, and therefore that the children of A., and not the persons who would have been entitled to A.'s personal estate if she had died without ever having been married, were entitled to the fund. [*Day v. Barnard*] . . . . . 351
6. A testator gave the interest of a sum of stock to his daughter, and after her death, gave the stock to the child or children of his daughter on their attaining the age of twenty-one years, and directed that in the event of his daughter dying without leaving issue, the stock should revert to his son. The will also contained a provision for the testator's son. The testator's daughter died leaving one child, who subsequently died under the age of twenty-one, having received a maintenance out of the said stock. Held, that the gift to the children of the testator's daughter was contingent on their attaining twenty-one, and that on the death of the child of the testator's daugh-

ter under twenty-one, the stock reverted to the testator's son. [*The Wrangham's Trust*] . . . 358

7. A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons, and gave the same to his trustees upon trust at their uncontrolled discretion to apply the same or such parts thereof as they should think proper, for the personal maintenance and support or otherwise for the benefit of his said son, or otherwise to apply the same in augmentation of the shares of the testator's other children. The trustees did not exercise the power, but paid the share in question into Court under the Trustee Relief Act. Held, that there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Brown v. Higgs* (4, 5, 8 Ves.), no gift could be implied, and therefore that there was an intestacy with respect to the share. [*Re Eddowes*] . . . . . 395
8. Gift of aliquot parts of a fund to the children of A., the children of B., the children of C. and the grandchildren of D. Provided that if any child or children of A. or B. or C. or any of the grandchildren of D. shall die in my lifetime, leaving a child or children living at my death and attaining twenty-one, the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and be entitled to the same share or shares which his, her or their deceased parent would have been entitled to if living at my decease. Held, 1. The word "children" could not be read "grandchildren," so as to let in

as original donee the child of a deceased child of A., who never had a child living at the date of the will. 2. The words "shall die" do not import future dying, but are equivalent to "shall be dead" or "shall have died." 3. A testator may so express himself as to cause a child of a deceased child to represent and be substituted for that deceased child, though he never intended a share for the deceased child: — and held, that in this case the proviso was large enough to show an intention that a child of a child deceased at the date of the will, and for whom therefore no share was intended, should represent or be substituted for that deceased child, and take the share which, if living at the date of the testator's death, the deceased child would have taken. *Christopherson v. Naylor*, and other cases of that class, distinguished, and *Waugh v. Waugh* disapproved and overruled. [*Loring v. Thomas*] . . . . . 497

9. A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. An act authorizing the making of a railway through land abounding with minerals contained a clause reciting the nature of the lands, and that the railway would intercept and obstruct the free intercourse between the adjacent lands, and so deprive them of their natural advantages; and it gave liberty to owners or occupiers to make any railway across the company's railway, "for the benefit of themselves and for all and every other person or persons to whom they or any of them may from time to time give leave, and in such way and for such

purposes as they or any of them may require." Held, by Mr. Baron Channell and Vice-Chancellor Kinnersley, dissentiente *Willes, J.*, that this power was confined to making a railway for the purposes of their own business in respect of the lands, and did not authorize the making of a railway for the purpose of carrying passengers and goods for hire. [*Hughes v. Chester and Holyhead Railway Company*] . . . . . 524

### CONTINGENT GIFT.

A testator gave the interest of a sum of stock to his daughter, and after her death gave the stock to the child or children of his daughter on their attaining the age of twenty-one years, and directed, that in the event of his daughter dying without leaving issue, the stock should revert to his son. The will also contained a provision for the testator's son. The testator's daughter died, leaving one child, who subsequently died under the age of twenty-one, having received a maintenance out of the said stock. Held, that the gift to the children of the testator's daughter was contingent on their attaining twenty-one, and that on the death of the child of the testator's daughter under twenty-one, the stock reverted to the testator's son. [*In re Wrangham's Trusts*] . . . 358

### CONTRIBUTORY.

A person in 1844 bought shares in a banking company and had them transferred to him. The company afterwards registered under the 20 & 21 Vict. c. 49, so as to come within the Winding-up Act, 1856. He was never entered on the list of shareholders under that act, but had received dividends, and after his death his executors received

dividends and then sold the shares. Held, that as he would have been a contributory under the old acts, so, following *Luard's case*, his executors were now contributories. [*Re Northumberland and Durham District Banking Company, Ex parte Dixon's Executors*] . 225

### CONVERSION.

Where a notice to treat for the purchase of certain property was served by a railway company on the owner of such property, and nothing further was done until after the death of the owner, who by his will had specifically devised the property comprised in the notice to treat. Held, 1st, that the mere notice to treat served by the company did not constitute a contract by the owner for the sale of the property; 2ndly, that if it did, a bill for specific performance would not lie against the owner, and therefore, that the notice to treat did not effect conversion of the property comprised in the notice. [*Haynes v. Haynes*] 426

### COPYHOLDS.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested or by contingent remainder, or executory devise, which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord of the manor, he is entitled to the benefit of the admittance of the first devisee under the will. The Court will not allow the possession of a receiver appointed by the Court to be disturbed without the leave of the Court. [*Randfield v. Randfield*] 310

### COSTS.

1. Although a trustee may under the 4th Order of 10th June, 1848, present a petition under the Trustee Relief Act as to monies paid in by himself, the Court in making an order on such petition gave him Respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. [*Re Hutchinson's Trusts*] . . 27
2. Where a person entitled to a share in a fund in Court, and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. In giving effect to the wife's equity to a settlement of a fund in Court, the rule of settling half on the wife is departed from either where the fund is very small and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance. Where the fund settled by the Court has been assigned, the Court, after providing for the wife and and her children, declares an ultimate trust, in case of the wife dying in the husband's lifetime without issue, in favour of the assignee. [*Ward v. Yates*] . . . 80
3. Costs incurred in selling real estate in an administration suit before decree charged on such real estate and not on the personal estate. Where it is ordered that real estates which are charged with incumbrances shall contribute rateably to the payment of costs, such estates must be valued for the purposes of such contribution at the net values, after payment of incumbrances. Where the Court

- had declared that certain devised estates were devised subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates, the Court held that under the circumstances of the case the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached. [*Barnwell v. Iremonger*] . . . . . 255
4. Where a legatee files a bill for the administration of a testator's estate, whether it is expressed that he does so on behalf of himself and the other legatees or not, he does in fact represent them, and when all the debts are paid the fund belongs to the legatees, and the plaintiff is entitled to his costs of suit as between solicitor and client, the fund not being sufficient to pay all the legacies in full. [*Thomas v. Jones*] . . . . . 134
  5. What disclaimer entitles a Defendant to his costs. [*Ward v. Shakeshaft*] . . . . . 269
  6. The rule that a solicitor trustee acting in the trusts shall not be allowed profit costs is not restricted to cases of express trust, but applies to the case of an executor or trustee, though there be no express trust. Profit costs disallowed an executor who had acted as his own solicitor upon an objection taken by a creditor who was a party to the suit. [*Pollard v. Doyle, Kearns v. Doyle*] . . . 319
  7. Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper, such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary decree allowing the Defendant necessary repairs and lasting improvements. A mortgagee in possession who has neglected or refused to render an account upon the demand of the mortgagor, refused his costs up to the hearing. [*Powell v. Trotter*] . . . . . 388
  8. Where land is taken by a railway company under the compulsory powers of the Lands Clauses Consolidation Act, and the purchase-money is paid into Court, all the costs occasioned thereby must be paid by the railway company, although some of such costs may have been occasioned by the existence of a suit, of which the land taken was the subject. Therefore, where land which formed the subject of a suit was taken by a railway company, and a petition was presented in the suit, and also in the matter of the act for the reinvestment of the purchase-money, which had been paid into Court, the company were ordered to pay the costs of the tenant for life and remaindermen in the land taken by them who were parties to the suit and served with the petition; and they were also ordered to pay the costs of former proceedings in the suit which had been occasioned by the company's taking the land. [*Haynes v. Barton*] . . . . . 483
  9. Costs of preparing interrogatories which were not used, owing to admissions being put in, allowed as between party and party. The 17th rule of 4th Consolidated Order, empowering the Taxing Master to consider whether he will allow an affidavit to be settled by counsel, does not take the question of costs of the affidavit out of the discretion of the Court. Costs of settling affidavit (which was an echo of the bill) by counsel allowed. Costs of drawing observations for counsel when cause stood over allowed. Term see al-

lowed where the only proceeding was leaving copy of decree and bill of costs before Taxing Master. [*Davies v. Marshall* (2)] . 564

#### COVENANT TO SETTLE AFTER-ACQUIRED PRO- PERTY.

Where a lady at the date of her marriage was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them, in right of the wife, should "by gift, descent, succession or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture: Held, that the words, "become entitled," imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of the coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant, but that the wife having been absolutely entitled to the two sums of stock at the date of the marriage, and there having been no subsequent change in her interest, those sums of stock did not come within the terms of the covenant. [*Archer v. Kelly*] . . . . . 300

#### COVENANT TO SETTLE FUTURE PROPERTY.

Where a covenant to settle after-acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession; and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation: Held, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it. [*Brooks v. Keith*] . . . 462

#### CREDITOR.

The rule, that a solicitor trustee acting in the trust shall not be allowed profit costs, is not restricted to cases of express trust, but applies to the case of an executor or trustee, though there be no express trust. Profit costs disallowed an executor who had acted as his own solicitor upon an objection taken by a creditor who was a party to the suit. [*Pollard v. Doyle*; *Kearns v. Doyle*] . 319

#### CREDITOR UNDER WINDING- UP TO SUE IN FORMA PAUPERIS.

Order ex parte for a person carrying in a claim under winding-up to sue in formâ pauperis. [*In the Matter of the Winding-up Acts, 1848 and 1849. In the Matter of the Irish Lands Improvement Society. Ex parte Fry*] . . 318

## CROWN.

Where personalty was bequeathed to persons upon trust for a charity, which failed under the Mortmain Act, and there were no next of kin: Held, that the executor was trustee for the Crown. [*Dacre v. Patrickson*] . . . . . 182

## DEFICIENT ESTATE.

Where a legatee files a bill for the administration of a testator's estate, whether it is expressed that he does so on behalf of himself and the other legatees or not, he does in fact represent them, and when all the debts are paid, the fund belongs to the legatees, and the Plaintiff is entitled to his costs of suit as between solicitor and client, the fund not being sufficient to pay all the legacies in full. [*Thomas v. Jones*] . . . . . 134

## DEMURRER.

A bill by executors to enforce performance of a contract entered into by the Defendants with the testator for sale of leaseholds alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given; and at that time and when the motion would, but for pressure of business, have been heard there was no probate; but when the motion was actually heard the probate was in Court. Held, that the Defendants could not resist the motion upon the ground of demurrer. Although executors can make an assignment, and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because, till the evidence of title exists, the executors cannot give a complete indemnity. [*Newton v.*

*The Metropolitan Railway Company*] . . . . . 583

## DEPOSIT OF VALUE IN BANK.

Where a railway company served a land owner with notice of their intention of taking a portion of certain property belonging to him for the purposes of their railway, and the land owner served upon the company a counter notice requiring them to take the whole of such property. Held, that the company could not take possession of any portion of the property until they had deposited the value of the whole property in the bank; and that it was not sufficient for them to deposit the value of that portion only of the land taken by them. [*Giles v. L. C. D. Rail. Co.*] 406

## DEVISE OF INCUMBERED ESTATES.

Costs incurred in selling real estate in an administration suit, before decree, charged on such real estate, and not on the personal estate. Where it is ordered that real estates, which are charged with incumbrances, shall contribute rateably to the payment of costs, such estates must be valued for the purposes of such contribution at the net values after payment of incumbrances. Where the Court had declared that certain devised estates were devised subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates, the Court held, that under the circumstances of the case the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on

which it attached. [*Barnwell v. Iremonger*] . . . . . 255

#### DIRECTION OF COURT.

The Court in directing a compromise under the 19th section of the 21 & 22 Vict. c. 60, exercises a judicial discretion, and will not direct the official liquidators to enter into a compromise without having the means of itself forming an opinion as to the propriety of the compromise. Therefore, where official liquidators applied to the Court to direct a compromise which had been proposed by a body of thirty-five shareholders in a company, which was being wound up, to pay among them an aggregate sum, in discharge of their liabilities as shareholders, but without disclosing to the Court the particulars or date of such compromise, the Court refused the application. It is in the discretion of the Court whether notice shall be given to creditors under the 19th section of the 21 & 22 Vict. c. 60. [*In re Northumberland and Durham District Banking Company, Ex parte Totty*] . . . . . 273

#### DIRECTORS.

A society was formed, certified and inrolled as a benefit building society; its rules did not indicate an intention that it should act as a benefit freehold land society. The directors bought land, and mortgaged it to secure money borrowed for the purchase, and certain members acting as trustees covenanted to pay the mortgage debt, and under that covenant they had to pay money. It did not appear that every member acquiesced in, or was even cognizant of the transaction. Held, that the act of the directors and trustees was *ultra vires*, and

the trustees could not compel contribution among the shareholders to recoup their loss. [*In re Kent Benefit Building Society*] . . . 417

#### DISCLAIMER AT THE BAR.

Upon a petition for the appointment of new trustees by the Court, it is not necessary that a disclaiming trustee, who has never acted, should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient. [*Foster v. Dawber*] . . . . . 172

#### DISCLAIMER.

What disclaimer entitles a defendant to his costs. [*Ward v. Shakeshaft*] . . . . . 269

#### DISCLAIMING TRUSTEE.

Upon a petition for the appointment of new trustees by the Court, it is not necessary that a disclaiming trustee, who has never acted, should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient. [*Foster v. Dawber*] . . . . . 172

#### DISCRETION IN THE COURT.

The Court will exercise its discretion as to whether it will order the removal of a trustee on the ground of bankruptcy, under the 130th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and it is not sufficient merely to show the fact of bankruptcy to induce the Court to make such an order. Therefore, where a trustee became bankrupt in 1855, and in 1856 obtained a first-class certificate, and had since been appointed to a position of trust, and in 1860 a petition was

presented for his removal on the ground of his bankruptcy in 1855, and also on the ground of vexatious conduct; but the petition did not allege that his continuing in the trust would endanger the trust property. Held, that it was not compulsory on the Court to make an order for the removal of such trustee, but that it had a discretion and dismissed the petition with costs. In all cases where jurisdiction is given to the Court by act of parliament by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the Court a discretion in the exercise of that jurisdiction. Charges of vexatious conduct as a ground for the removal of a trustee must be made by bill, and not by petition. [*Re Bridgman*] 164

#### DISSOLUTION.

Where partners who are so under contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will of its own authority, dissolve the partnership against the will of one of the partners. [*Baxter v. West*] 173

#### DISTRINGAS.

Distringas discharged, with costs, where made applicable by the person who obtained the writ to a sum of stock, which was not the particular stock mentioned in the affidavit on which the writ had been granted. General practice of the Bank of England, with reference to writs of distringas, observed upon. [*In re Cross*]. . . 580

#### DOWER.

A. B. died intestate, seised of real

estates, under which were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed in May, 1845, by his infant daughter and heiress at law, by her next friend, for the administration of his estate, it was, by the order of the Court, on further directions, dated the 24th of May, 1846, declared, that the intestate's widow was entitled to dower out of his freehold estates, and it was referred back to the Master to inquire what was due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the real estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into Court, to the account of the infant Plaintiff, and the Master was ordered to prosecute an inquiry, directed by the decree on the hearing (dated the 12th of December, 1845,) respecting the leasing the intestate's estates for coal mines. Under an order of the Court of the 7th of March, 1855, the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. On the 28th of April, 1855, the widow again married. On the 23rd of April, 1856, the Master, by his report, found it would be fit that the whole estate should be let for coal mines. On the 8th of May, 1856, an order was made, approving of a provisional agreement entered into for a lease, and directing that the agreement should be carried out by a lease to be settled by the Judge in chambers. A lease dated the 15th day of November, 1857, was



settled in chambers, in which the infant Plaintiff granted and demised, and the widow, as guardian, with the consent of her second husband, granted, demised, leased and confirmed, all the mines under the estate, except within a certain area round a house, the rents and royalties, (and, amongst others, a rent or sum of 4*l.* 4*s.* for every acre of the surface used for raising coal, &c.), being reserved to the infant Plaintiff. All the covenants were entered into by or with the infant. Held, 1st, that the proceedings which had taken place in the suit did not amount to an assignment of dower. 2ndly. That the widow was entitled, in respect of her dower, to one-third of the yearly income which had arisen, or might arise, from the amount of the purchase-money of poles and small timber cut and sold under the direction of the Court. 3rdly. That as the lease was intended to be made for the benefit of the infant alone, the widow was not entitled, in respect of dower, to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her husband, the intestate. Held, also, that until an assignment, the widow was entitled to one-third of the rents of the real estate of the land, exclusive of the rents and profits of the mines, but inclusive of the rents paid by the lessees for any portion of the surface of the land used for the purpose of the mines. And semble, that a widow dowerable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third

of the royalties as corpus. [*Dickin v. Hamer*] . . . . . 284

### EVIDENCE.

Rules of practice as to a Defendant reading his own answer, or the answer of a co-Defendant, on motion for a decree. [*Stevens v. Heathcote*] . . . . . 138

### EXCEPTIONS.

1. Where a Defendant, who was the surviving partner in a firm of commission wine-merchants, being required to set out in his answer an account of the partnership assets, liabilities and dealings for the six months preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the Plaintiff excepted for insufficiency: The Court allowed the exception, and held, that the Defendant ought to have set out the account in a schedule to his answer, and that the objection, that the names of the customers were privileged, did not apply to such a case. [*Telford v. Ruskin*] . 148
2. Under the new practice it is not necessary to introduce charges, suggesting imagined facts, to found an interrogatory; so that where a bill charged the existence of a mortgage known to the Plaintiff, but did not charge that there were others, an interrogatory "whether there were others," was held to be correct. A plea of privilege by the answer, alleging that the Defendant has acquired information as solicitor of *A. B.*, acting as such in relation to the matters inquired after, but not alleging that he acquired it from the client,

is insufficient. Where a bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief. Held, that a Defendant cannot protect himself from answering, on the ground that as to one branch of the relief the bill would be demurrable, for that would be a demurrer to the whole bill. [*Marsh v. Keith*]. 342

### EXECUTORS.

1. Where personalty was bequeathed to persons upon trust for a charity, which failed under the Mortmain Act, and there were no next of kin: Held, that the executor was trustee for the crown. [*Dacre v. Patrickson*] . . . . . 182
2. Where leaseholds were devised to three trustees and executors, and one of them having died, the two surviving trustees and executors (one of whom had never acted as executor), under an order of the Court, assigned the leaseholds in trust for themselves and a newly-appointed trustee: Held, that by such assignment the leaseholds vested in them quâ trustees and not quâ executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will. Where an executor fairly represents everything to the Court a decree directing him to deal with the property must operate as an indemnity to him. The act of the 22 & 23 Vict. c. 35 is retrospective in its operation. [*Smith v. Smith*] . . . 384

### EXECUTORS' INDEMNITY.

Fund which had been set apart out of residue to indemnify executors in respect of leaseholds of testator ordered to be paid out to residuary legatee, such indemnity, since the passing of the Law of Property Vol. I.

Amendment Act, being no longer necessary. The 27th section of the Law of Property Amendment Act is retrospective in its operation. [*Dodson v. Sammell*] . . . 575

### EXECUTORS, RIGHTS OF.

A bill by executors to enforce performance of a contract entered into by the Defendants with the testator for sale of leaseholds alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at the time and when the motion would but for pressure of business have been heard, there was no probate, but when the motion was actually heard the probate was in Court. Held, that the Defendants could not resist the motion upon the ground of demurrer. Although executors can make an assignment and give a receipt for purchase-money which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists the executors cannot give a complete indemnity. [*Newton v. The Metropolitan Railway Company*] . . . . . 583

### EXECUTORY DEVISEE.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested or by contingent remainder or executory devise, which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord of the manor he is entitled to the benefit of the admittance of the first devisee under the will. The Court will not allow the possession of a receiver appointed by the Court to

be disturbed without the leave of the Court. [*Randfield v. Randfield*] 310

### EXONERATION.

Under a direction to pay debts, mortgage debts are included. Therefore, where a testator directed his trustees to stand possessed of his residuary estate, "subject in the first place to the payment of my just debts, funeral and testamentary expenses," and in a subsequent part of his will, empowered his trustees to "satisfy any debts owing or claimed to be owing by me or from my estate, and any liabilities to which I or my estate may be liable." Held that this was a sufficient indication of intention to exonerate a mortgaged estate, and that the mortgage debt charged thereon must be paid out of the residuary estate. [*Stone v. Parker*] . . . . . 212

### FIXED LEGACIES.

Where a testatrix appointed 600*l.* to a trustee upon trust to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient. Held, that the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that, therefore, the legacies to the daughters must be paid in priority,

and were not liable to abate *pari passu* with the residue. [*Harley v. Moon*] . . . . . 623

### FORECLOSURE.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot, in foreclosing, have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears, and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*] 412

### FOREIGN COURT, CASE FOR.

In a case of conflict of opinions on a question of pure and difficult Scotch law, the Court will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scotch Court. But it is matter of discretion in this Court. Mode in which the case is prepared. [*Lord v. Colvin*] 24

### FORM OF SETTLEMENT.

Where a person entitled to a share in a fund in Court, and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. In giving effect to the wife's equity to a settlement of a fund in Court, the rule of settling half on the wife is departed from either where the

fund is very small and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance. Where the fund settled by the Court has been assigned, the Court, after providing for the wife and her children, declares an ultimate trust in case of the wife dying in the husband's lifetime without issue in favour of the assignee. [*Ward v. Yates*] . . . . . 80

# FRAUDULENT TRUSTEES ACT, PROCEEDINGS UNDER (20 & 21 Vict. c. 54). SANCTION OF THE COURT.

The Court sanctioned proceedings under the 13th section of the 20 & 21 Vict. c. 54, upon an affidavit stating that a trustee had paid 1,409*l.* into his private bankers, had drawn out the whole with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust fund. [*Wadhani v. Rigg*] 216

# FUND IN COURT.

Although the Court will not order payment to a defaulting receiver of his share in the estate under administration until he has made good his default, yet the same principle does not apply as against his assignees to the case of a share devolving on such defaulting receiver in his character of next of kin of a person originally entitled to a share in the same estate, notwithstanding that such share may have been paid into Court with the assent of the personal representative of the person so originally entitled to the share, but

in the absence and without the assent of the assignees of such defaulting receiver. [*Brandon v. Brandon*] . . . . . 16

# GIFT OF PERSONALTY TO HEIRS.

Where a testator bequeathed personalty "equally between the heirs of my late uncle, *William Neve*, *John Neve*, and my aunt *Penelope Francis*," all three of whom were dead at the date of the will. Held, that the heirs at law of those three persons living at the death of the testator, and not their next of kin, were entitled. The decision in *Evans v. Salt*, 6 Beav. 267, disapproved of. [*In re Rootes*] . 228

# GUARDIAN AD LITEM.

Where an infant is entitled to appear as respondent on a petition, whether in a matter or a cause, he must appear by a duly constituted guardian ad litem. Costs of trustees who had been served and appeared on a petition by a tenant for life, for investments of railway purchase-monies allowed against the company. [*In re Duke of Cleveland's Harte Estates*] . 46

# IMPLIED GIFT.

A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons and gave the same to his trustees upon trust at their uncontrolled discretion, to apply the same or such parts thereof as they should think proper for the personal maintenance and support, or otherwise for the benefit of his said son, or otherwise to apply the same in augmentation of the shares of the testator's other children.

The trustees did not exercise the power, but paid the share in question into the Court under the Trustee Relief Act. Held, that there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Browne v. Higgs* (4, 5, 8 Vesey), no gift could be implied, and therefore, that there was an intestacy with respect to the share. [*Re Eddowes*] . . . . . 395

### INDEMNITY.

Where leaseholds were devised to three trustees and executors, and one of them having died, the two surviving trustees and executors (one of whom had never acted as executor) under an order of the Court assigned the leasehold in trust for themselves and a newly appointed trustee. Held, that by such assignment the leaseholds vested in them *quà* trustees and not *quà* executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will. Where an executor fairly represents everything to the Court, a decree directing him to deal with the property must operate as an indemnity to him. The act of the 22 & 23 Vict. c. 35, is retrospective in its operation. [*Smith v. Smith*] . 384

### INFANTS.

Where an infant is entitled to appear as respondent on a petition, whether in a matter or a cause, he must appear by a duly constituted guardian ad litem. Costs of trustees who had been served and appeared on a petition by a tenant for life, for investments of railway purchase-mones allowed against the company. [*In re Duke of Cleveland's Harte Estates*] . 46

### INJUNCTION.

1. The Court of Chancery exercises a discretion in permitting actions at law to proceed, but it will never permit its decisions to be questioned in a Court of Law. Therefore, where an action of trover was brought against a sheriff for an ejectment under a writ of assistance issued in pursuance of an order of the Court, an injunction was granted, restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order. [*Walker v. Micklethwait*] . . 49
2. A shareholder in a company, who was also a creditor of the company, obtained judgment against the company for money due to him. The assets of the company had been assigned to another company of which he had become a shareholder, and not being able to obtain payment of his debt, he gave notice under the 68th section of the Joint Stock Companies Registration Act, (7 & 8 Vict. c. 110,) to another shareholder in the first company, who had not become a shareholder in the second company, that he should proceed against him individually to recover the debt. Upon a bill for an injunction by the shareholder so proceeded against, to restrain the proceedings at law, but without asking for other relief. Held, that the Court of Common Law had full jurisdiction to deal with the case, and the injunction was refused with costs. [*Hardinge v. Webster*] . . . . . 101
3. Where a defendant to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel, and that the Plaintiff's patent was invalid,

- the Court on a motion by the Plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction or to give leave to bring an action unless he produced a clear and distinct affidavit that the invention was novel and the patent valid, but allowed the motion to stand over for that purpose. [*Whitton v. Jennings*] . . . 110
4. Where a bill was filed by a single shareholder against the directors of a banking company and the banking company, for an injunction to restrain the directors from paying a dividend already declared, and from declaring or paying any future dividends except out of the profits of the bank, but the other shareholders were not before the Court. The Court granted an injunction as to future dividends, but refused to restrain the payment of the dividend which had been declared, on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and that the Court would not in the absence of the shareholders interfere with that right. A Plaintiff in order to enable him to file a bill on behalf of himself and other persons, must have a common interest with such persons. [*Fawcett v. Laurie*] . 192
5. A Court of Equity interferes, by injunction, to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property, and the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation; therefore, it is not necessary that a Plaintiff filing a bill for an injunction to restrain such an injury should be in the actual oc-

cupation of the property. Where a Plaintiff filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with his windows, which he alleged were ancient lights, some of which had been recently enlarged and some new lights had been opened, and an interim order had been granted: Upon a motion for an injunction, the Court gave the Plaintiff liberty to bring an action at law, but allowed the Defendant to proceed with the new building to a specified height, on his undertaking to abide by any order the Court might make as to pulling down any addition which might be made to the erection complained of by the bill, and also undertaking to admit at the trial that the erection had been carried to such specified height. Form of order. The case of *Renshaw v. Bean* (18 Q. B. 112), commented on. [*Wilson v. Tonnend*] . . . 324

#### INSOLVENT ESTATE.

Order made under the 44th section of the 15 & 16 Vict. c. 86, in a creditors' suit, for the appointment of a person to represent the deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that after payment of incumbrances out of the proceeds of the sale no surplus would be left, and upon notice being given to the debtor's next of kin, who were entitled to take out administration. [*Davies v. Boulcott*] . . . 23

#### INTEREST ON DEBENTURE COUPONS.

Interest payable on coupons to debentures, though payable half-

The trustees did not exercise the power, but paid the share in question into the Court under the Trustee Relief Act. Held, that there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Browne v. Higgs* (4, 5, 8 Vesey), no gift could be implied, and therefore, that there was an intestacy with respect to the share. [*Re Eddomes*] . . . . . 395

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[*Whitton v. Jennings*] . . . 110

4. Where a bill was filed by a single shareholder against the directors of a banking company and the banking company, for an injunction to restrain the directors from paying a dividend already declared, and from declaring or paying any future dividends except out of the profits of the bank, but the other shareholders were not before the Court. The Court granted an injunction as to future dividends, but refused to restrain the payment of the dividend which had been declared, on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and that the Court would not in the absence of the shareholders interfere with that right. A Plaintiff in order to enable him to file a bill on behalf of himself and other persons, must have a common interest with such persons. [*Fawcett v. Laurie*] . 192

5. A Court of Equity interferes, by injunction, to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property, and the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation; therefore, it is not necessary that a Plaintiff filing a bill for an injunction to restrain such an injury should be in the actual oc-

cupation of the property. Where a Plaintiff filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with his windows, which he alleged were ancient lights, some of which had been recently enlarged and some new lights had been opened, and an interim order had been granted: Upon a motion for an injunction, the Court gave the Plaintiff liberty to bring an action at law, but allowed the Defendant to proceed with the new building to a specified height, on his undertaking to abide by any order the Court might make as to pulling down any addition which might be made to the erection complained of by the bill, and also undertaking to admit at the trial that the erection had been carried to such specified height. Form of order. The case of *Renshaw v. Bean* (18 Q. B. 112), commented on. [*Wilson v. Townend*] . . . 324

#### INSOLVENT ESTATE.

Order made under the 44th section of the 15 & 16 Vict. c. 86, in a creditors' suit, for the appointment of a person to represent the deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that after payment of incumbrances out of the proceeds of the sale no surplus would be left, and upon notice being given to the debtor's next of kin, who were entitled to take out administration. [*Davies v. Boulcott*] . . . 23

#### INTEREST ON DEBENTURE COUPONS.

Interest payable on coupons to debentures, though payable half-



yearly, accrues due de die in diem, and is therefore subject to apportionment. [*In re Rogers' Trusts*] . . . . . 338

### INTESTACY.

A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons, and gave the same to his trustees, upon trust at their uncontrolled discretion to apply the same, or such parts thereof as they should think proper, for the personal maintenance and support or otherwise for the benefit of the said son, or otherwise to apply the same in augmentation of the shares of the testator's other children. The trustees did not exercise the power, but paid the share in question into Court under the Trustee Relief Act. Held, that there being no gift in favour of the person who would be benefited by the exercise of the power as in *Brown v. Higgs* (4, 5, 8 Ves.), no gift could be implied, and therefore that there was an intestacy with respect to the share. [*Re Eddowes*] . . . . . 395

### JOINT STOCK COMPANIES.

The directors of a company transferred all its assets, liabilities and business to another company under a deed of amalgamation, by which it was provided, that the shareholders in the old company should exchange their shares for shares in the new company, and that the new company should indemnify the old company in respect of all its debts and liabilities. Some only of the shareholders in the old company executed the deed of amalgamation, and became shareholders in the new company.

The new company disputed their liability to carry out the arrangement for the amalgamation, and did not pay the debts of the old company, and actions were brought against the old company. The new company subsequently assigned their business but not their assets to another company. Upon a petition for the winding up of the old company presented by a shareholder in the new company, who had originally been a shareholder in the old company, and which was supported by the shareholders of the old company who had executed the deed of amalgamation, but opposed by those who had not, the Court refused to order the old company to be wound up, and dismissed the petition with costs as against those shareholders who had been served, but without costs as against those shareholders who had voluntarily appeared. A shareholder in the new company gave notice to a third company, to whom the new company had assigned its business, not to pay certain monies due from them to the new company, in consequence of which litigation ensued. The shareholder then presented his petition to wind up the new company. Held, that the existence of suits against the company was not, per se, proof of its insolvency, and the petition was ordered to stand over, with liberty to apply. [*In re The Anglo-Australian and Universal Assurance Company, Ex parte Smith; In re British Provident Life and Fire Assurance Society, Ex parte Collins; In re The Winding-up Acts 1848 and 1849*] . . . 113

### JUDGMENT.

Testator limited real and personal estate to trustees for A. B. for life, with a limitation over in case he

should thereafter become bankrupt or insolvent, &c., or if by his act or default, the rents, &c. should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will, there was the usual power of attorney, and judgment was entered up, but nothing further done and the tenant for life did not in any manner alienate after the date of the will: Held, that judgment without more only operated as an equitable charge, and did not vest the rents in or make them payable to assignees. That upon the authorities, and in particular *Manning v. Chambers*, the insolvency before the date of the will was within the words, "shall thereafter become bankrupt," &c. [*Seymour v. Lucas*] . . . 177

#### JURISDICTION.

1. A company incorporated by act of parliament cannot exercise its powers or apply its capital, except in strict conformity with the act. An act of parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing, and therefore a railway company with the ordinary powers was restrained from carrying on the business of coal merchants at the suit of the Attorney-General on the relation of a stranger to the company. The 7 & 8 Vict. c. 85, ss. 16, 17, and the 17 & 18 Vict. c. 31, do not take away the jurisdiction of the Court or of the Attorney-General. [*Attorney-General v. Great Northern Railway Company*] . . . . . 154
2. The Court need not upon the question whether an appearance shall be entered for a Defendant

enter into the question of jurisdiction. Therefore, where a Plaintiff moved for leave to enter an appearance for the Defendant, her majesty's secretary of state for war, and the Defendant appeared on such motion under protest and raised the question as to the jurisdiction of the Court upon a bill submitting that the proper course would have been by petition of right, the Court refused to enter into the question of jurisdiction, and gave the Plaintiff leave to enter an appearance for the Defendant. [*Felkin v. Lord Herbert*]

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#### LEASEHOLDS.

1. Where leaseholds were devised to three trustees and executors, and one of them having died, the two surviving trustees and executors (one of whom had never acted as executor), under an order of the Court, assigned the leaseholds in trust for themselves and a newly appointed trustee: Held, that by such assignment the leaseholds vested in them quâ trustees and not quâ executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will. Where an executor fairly represents everything to the Court, a decree directing him to deal with the property must operate as an indemnity to him. The act of the 22 & 23 Vict. c. 35 is retrospective in its operation. [*Smith v. Smith*] . . . . . 384
2. Fund which had been set apart out of residue to indemnify executors in respect of leaseholds of testator ordered to be paid out to residuary legatee, such indemnity since the passing of the Law of Property Amendment Act being

no longer necessary. The 27th section of the Law of Property Amendment Act is retrospective in its operation. [*Dodson v. Sammell*] . . . . . 575

### LEAVE TO BRING ACTION AT LAW.

Where a Defendant to a bill filed for an injunction to restrain the infringement of a patent or for leave to bring an action at law stated by his answer, that the invention was not novel, and that the Plaintiff's patent was invalid, the Court on a motion by the Plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction or to give leave to bring an action, unless he produced a clear and distinct affidavit that the invention was novel and the patent valid, but allowed the motion to stand over for that purpose. [*Whitton v. Jennings*]  
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### LEGACY CHARGED ON REAL ESTATE.

A testator gave a legacy on the death of his granddaughter to her child or children to be paid to such child or children at his, her or their respective ages of twenty-one years, and directed that the shares of such child or children as at the time of his granddaughter's death should be under the age of twenty-one years, should bear interest at the rate of 5*l.* per cent., and charged the legacy on his residuary real and personal estate, and the personal estate was deficient. The granddaughter died leaving one child, who afterwards died under twenty-one: Held,

that the legacy sank into and was not raisable out of the testator's real estate. [*Parker v. Hodgson*] . . . . . 568

### LEGATEE'S SUIT.

Where a legatee files a bill for the administration of a testator's estate, whether it is expressed that he does so on behalf of himself and the other legatees or not, he does in fact represent them; and when all the debts are paid, the fund belongs to the legatees, and the Plaintiff is entitled to his costs of suit as between solicitor and client, the fund not being sufficient to pay all the legacies in full. [*Thomas v. Jones*] . . . 134

### LIMITATION OVER.

A testator bequeathed the residue of his estate to trustees upon trust to transfer one moiety to his sister, and the other moiety to his three brothers, *Richard, James Jenkinson and John*, and directed that "should not my said brother *Richard Green*, who is supposed to be now alive and resident in *Australia*, make any claim to the shares and interests in the said several trust monies to which he may become entitled under this my will, within the time or space of three years next after my decease," then the trustees were, at the expiration of such three years, to transfer the "shares and interests of the said *Richard Green*" unto his sister and two brothers, *James Jenkinson and John*, in equal shares. *Richard Green* died in the lifetime of the testator. Held, that *Richard Green's* share in the residue did not lapse by his death without claiming it, but that it passed by the gift over to the sister and two surviving brothers. [*Re Green's Estate.*] 68

## LOAN BY DIRECTOR TO COMPANY.

The clause contained in the 29th section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), requiring every contract or dealing in which a director is interested to be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, is not confined to contracts, or dealings ejusdem generis with the contracts referred to in the preceding clause of the same section, which merely incapacitates a director from voting respecting specified contracts in which he is interested, but includes an advance of money by a director to the company. The words "summoned for that purpose" apply to a special meeting, and not to a general meeting, of shareholders; but to give force to a contract, as against the company it is necessary not only that the question should be discussed and even unanimously approved of by such a meeting, but that the terms of such contract should be submitted, and be by resolution approved and confirmed to give it validity. Therefore where directors lent money to a company, and in a report presented by the directors to the next general meeting of shareholders was contained an item, "loans 6,000*l.*," which item was discussed, and the report was approved and confirmed by the meeting, and a winding-up order was subsequently made against the company. The Court, upon a claim by one of the directors for the money so advanced by him to the company, disallowed the claim, holding that it was such a contract by a director with the company as was contemplated by

the 7 & 8 Vict. c. 110, s. 29, and that the terms of such contract had not been approved and confirmed by a meeting of the shareholders as required by that section. But, considering that it is competent for a director to advance money to carry on the business of the company, the Court held, that the director was entitled to establish a claim for so much of the money as had been properly applied for the purposes of the company. [*In re National Patent Steam Fuel Company, Baker's Case*] . . . . . 55

## MARRIED WOMEN, MONEY ADVANCED TO.

Although the Courts of Common Law do not recognize the right of a person to recover from the husband money advanced to the wife to enable her to provide herself with necessaries, the Courts of Equity do not require that the person making such advances should have himself supplied the wife with necessaries, but hold that he is entitled to stand in the place of the person who actually supplied such necessaries, and to recover from the husband such sums of money so advanced to the wife as have been duly applied in providing her with necessaries, having regard to the husband's circumstances and position in life. Form of inquiry as to sums of money advanced and necessaries supplied to the wife. [*Jenner v. Morris.*]

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## MERGER.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot in foreclosing have an account of arrears of rent for more than six

years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears ; and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*]

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### MINES.

A. B. died intestate seised of real estates, under which were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed in May, 1845, by his infant daughter and heiress-at-law, by her next friend for the administration of his estate, it was, by order of the Court on further directions dated the 24th of May, 1846, declared that the intestate's widow was entitled to dower out of his freehold estates, and it was referred back to the Master to inquire what was due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the real estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into Court, to the account of the infant plaintiff; and the Master was ordered to prosecute an inquiry directed by the decree on the hearing (dated the 12th December, 1845), respecting the leasing the intestate's estates for coal mines. Under an order of the Court of the 7th of March,

1855, the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. On the 28th of April, 1855, the widow again married. On the 23rd of April, 1856, the Master, by his report, found it would be fit that the whole estate should be let for coal mines. On the 8th of May, 1856, an order was made approving of a provisional agreement entered into for a lease, and directing that the agreement should be carried out by a lease to be settled by the Judge in chambers. A lease dated 15th November, 1857, was settled in chambers, in which the infant plaintiff granted and demised, and the widow as guardian, with the consent of her second husband, granted, demised, leased and confirmed all the mines under the estate, except within a certain area round a house, the rents and royalties (and amongst others a rent or sum of 4*l.* 4*s.* for every acre of the surface used for raising coal, &c.), being reserved to the infant plaintiff. All the covenants were entered into by or with the infant. Held, 1. That the proceedings which had taken place in the suit did not amount to an assignment of dower. 2. That the widow was entitled in respect of her dower to one-third of the yearly income which had arisen or might arise from the amount of the purchase-money of poles and small timber cut and sold under the direction of the Court. 3. That as the lease was intended to be made for the benefit of the infant alone, the widow was not entitled in respect of dower to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her

husband the intestate. Held also, that until an assignment the widow was entitled to one-third of the rents of the real estate of the land, exclusive of the rents and profits of the mines, but inclusive of the rents paid by the lessees for any portion of the surface of the land used for the purpose of the mines. And semble, that a widow dowable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third of the royalties as corpus. [*Dickin v. Hamer*] . . . 284

#### MISREPRESENTATION.

When a company issues a prospectus, a person contracting to take shares on the statements therein contained has a right not only not to be misled by any statements actually false, but to be informed of all the facts the knowledge of which might reasonably have deterred him from so contracting. And if the prospectus in that sense contains misrepresentation or the absence of true representation, the contract will not be enforced. What concealment or ambiguity amounts to misrepresentation. Semble, that when a person contracts to take shares, but has not done specific acts necessary under an act of parliament to make him a shareholder at law, equity will enforce the contract, and compel him to do those acts. [*The New Brunswick and Canada Railway and Land Company v. Muggerridge*] 363

#### MORTGAGED ESTATE.

Under a direction to pay debts mort-

gage debts are included. Therefore, where a testator directed his trustees to stand possessed of his residuary estate, "subject, in the first place, to the payment of my just debts, funeral and testamentary expenses," and in a subsequent part of his will empowered his trustees to "satisfy any debts owing or claimed to be owing by me or from my estate, and any liabilities to which I or my estate may be liable." Held, that this was a sufficient indication of intention to exonerate a mortgaged estate, and that the mortgage debt charged thereon must be paid out of the residuary estate. [*Stone v. Parker*] . . . . . 212

#### MORTGAGEE.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot in foreclosing have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears, and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*] . . . . . 412

#### MORTGAGEE IN POSSESSION.

Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowance for repairs and improvements, which the mortgagor objects to as being unnecessary and

improper, such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary decree, allowing the Defendant "necessary repairs, and lasting improvements." A mortgagee in possession, who had neglected or refused to render an account upon the demand of the mortgagor, refused his costs up to the hearing. [*Powell v. Trotter*]

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### MORTGAGOR.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot, in foreclosing, have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of the arrears; and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagee assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*]. . . . . 412

### MORTGAGOR AND MORTGAGEE.

Where a first mortgagee, under his power of sale, sold the mortgaged premises by private contract to second mortgagees, who were mortgagees in possession, and also trustees for sale for the mortgagor, and the mortgage deed required that before any sale should be made three months' notice should be given to the mortgagor, and contained a clause that a purchaser should not be required to ascer-

tain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees, at the time they purchased, knew that the three months' notice had not been given to the mortgagor, he having died sometime before, and no administration having then been taken out to his estate. Upon a suit for redemption by the mortgagor's administratrix: Held, that she was entitled to redeem, and that the clause discharging a purchaser from ascertaining whether proper notice has been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given. There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. [*Parkinson v. Hanbury*] . . . . 143

### MOTION FOR DECREE.

1. Rules of practice as to a Defendant reading his own answer, or the answer of a co-Defendant, on motion for a decree. [*Stephens v. Heathcote*]. . . . . 138
2. The practice as to closing evidence does not apply to motions for decree, and a notice to cross-examine given after the seven days for filing affidavits in reply is regular. [*Bedwell v. Prudence*]

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### NE EXEAT.

A Defendant trustee was in contempt for not answering, and out of the jurisdiction. It appeared that he had gone out of the jurisdiction to avoid answering; that he had sold out the trust fund to an

amount exceeding 20,000*l.*; that he had come from *Boulogne* with a return ticket, and intended to depart shortly; and that he had in fact been arrested at the station on the day before the motion for a *ne exeat* was made, while attempting to depart. The order for a writ of *ne exeat* was made. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*. [*Hawkins v. Hawkins*]. . . . . 75

### NECESSARIES.

Although the Courts of Common Law do not recognize the right of a person to recover from the husband money advanced to the wife to enable her to provide herself with necessities, the Courts of Equity do not require that the person making such advances should have himself supplied the wife with necessities, but hold that he is entitled to stand in the place of the person who actually supplied such necessities, and to recover from the husband such sums of money so advanced to the wife as have been duly applied in providing her with necessities, having regard to the husband's circumstances and position in life. Form of inquiry as to sums of money advanced and necessities supplied to the wife. [*Jenner v. Morris*]. . . . . 218

### NECESSARY REPAIRS AND LASTING IMPROVEMENTS.

Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper,

such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary decree allowing the defendant "necessary repairs and lasting improvements." A mortgagee in possession who had neglected or refused to render an account upon the demand of the mortgagor, refused his costs up to the hearing. [*Powell v. Trotter*] . 388

### NEXT OF KIN.

A gift of a life estate to a person who would be the testator's next of kin at his death, with remainder over to his next of kin, excluding some of the persons who would be some of his next of kin, does not exclude the donee of the life estate from taking under the gift to the next of kin. [*Lee v. Lee*] 85

### NOTICE OF SALE TO MORTGAGOR.

Where a first mortgagee under his power of sale sold the mortgaged premises by private contract to second mortgagees, who were mortgagees in possession, and also trustees for sale for the mortgagor, and the mortgage deed required that before any sale should be made, three months' notice should be given to the mortgagor, and contained a clause that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees at the time they purchased knew that the three months' notice had not been given to the mortgagor, he having died some time before, and no administration having then been



taken out to his estate. Upon a suit for redemption by the mortgagor's administratrix: Held, that she was entitled to redeem, and that the clause discharging a purchaser from ascertaining whether proper notice has been given does not protect a purchaser who purchases with actual knowledge that such notice has not been given. There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. [*Parkinson v. Hanbury*] . 143

#### NOTICE TO TAKE LAND.

Where a railway company served a landowner with a notice of their intention to take a portion of certain property belonging to him for the purposes of their railway, and the landowner served upon the company a counter notice requiring them to take the whole of such property: Held, that the company could not take possession of any portion of the property until they had deposited the value of the whole property in the bank, and that it was not sufficient for them to deposit the value of that portion only of the land taken by them. [*Giles v. London, Chatham and Dover Railway Company*] 406

#### NOTICE TO TREAT.

Where a notice to treat for the purchase of certain property was served by a railway company on the owner of such property, and nothing further was done until after the death of the owner, who by his will had specifically devised the property comprised in the notice to treat: Held, 1st. That the mere notice to treat served by the company did not constitute a contract by the owner for the sale of

the property; and, 2ndly. That if it did, a bill for specific performance would not lie against the owner; and, therefore, that the notice to treat did not effect conversion of the property comprised in the notice. [*Haynes v. Haynes*] . 426

#### OUTSTANDING TERM.

Although there is in a mortgage deed a covenant to pay principal and interest, a mortgagee cannot, in foreclosing, have an account of arrears of rent for more than six years. But if there is a term in a trustee to secure the mortgage, the mortgagee will have a general account of arrears, and it is the same if there is an agreement that an outstanding term shall be assigned in trust. A term outstanding in a trustee for a mortgagor and to attend, is not so merged by the 8 & 9 Vict. c. 112, as to prevent the mortgagee assigning it to a trustee as a security for the mortgage debt. [*Shaw v. Johnson*] . . . . . 412

#### PARTITION COMMISSIONERS, DIRECTIONS TO.

The Court will interfere and direct partition commissioners, in the exercise of their discretion, in case of miscarriage by them; but an application to the Court to give such directions must be made by one of the tenants in common, and be founded on something the commissioners have done, or on some dealing between the tenants in common. The Court has no jurisdiction to interfere upon the application of a stranger or of a tenant in common, founded on dealings between one of the tenants in common and such stranger. [*Wright v. Vernon*] . . . 231

**PARTNERSHIP.**

Where partners who are so under contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will, of its own authority, dissolve the partnership against the will of one of the partners. [*Baxter v. West*] 173

**PAYMENT OF DIVIDENDS.**

Where a bill was filed by a single shareholder against the directors of a banking company, and the banking company, for an injunction to restrain the directors from paying a dividend already declared, and from declaring or paying any future dividends except out of the profits of the bank, but the other shareholders were not before the Court: the Court granted an injunction as to future dividends, but refused to restrain the payment of the dividend which had been declared, on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and that the Court would not, in the absence of the shareholders, interfere with that right. A Plaintiff, in order to enable him to file on behalf of himself and other persons, must have a common interest with such persons. [*Fawcett v. Laurie and Others*] . . . . . 192

**PAYMENT OUT TO DEFAULTING PARTIES.**

Although the Court will not order payment to a defaulting receiver of his share in the estate under administration until he has made good his default, yet the same principle does not apply, as against his assignees, to the case of a share devolving on such defaulting re-

ceiver in his character of next of kin of a person originally entitled to a share in the same estate, notwithstanding that such share may have been paid into Court with the assent of the personal representative of the person so originally entitled to the share, but in the absence of and without the assent of the assignees of such defaulting receiver. [*Brandon v. Brandon*] 16

**PAYMENT OF FUND IN COURT TO HUSBAND.**

Where a ward of Court who was entitled to a fund on attaining twenty-one, married without the consent of the Court, and no settlement was made on the marriage, and afterwards having attained twenty-one, together with her husband petitioned the Court for the payment of the fund to her husband; the Court refused to make an order for payment to the husband, but directed a reference as to a settlement. [*Gynn v. Gilbard*] . . . 356

**PETITION.**

1. Although a trustee may, under the 4th Order of the 10th of June, 1848, present a petition under the "Trustee Relief Act," as to monies paid in by himself, the Court, in making an order on such petition, gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. [*Re Hutchinson's Trnsts*] . . . . . 27
2. When a final order has been made on a petition it can no longer be said to be a matter actually pending for the purposes of the 16 & 17 Vict. c. 137, s. 17. Therefore where a petition was presented for the appointment of new trustees under a scheme ordered and settled by the

instituted by bill, and that the case was not one for an administration summons under the 45th sect. of the 15 & 16 Vict. c. 86, and therefore that the plaintiff was entitled to his costs. [*Smith v. Spilsbury*] . . . . . 151

4. Distringas discharged with costs where made applicable by the person who obtained the writ to a sum of stock which was not the particular stock mentioned in the affidavit on which the writ had been granted. General practice of the Bank of England with reference to writs of distringas observed upon. [*In re Cross*]. 580
5. Common order to revive granted to administrator of sole plaintiff by whose death it had become abated. [*Ward v. Shakeshaft*] 607

6. The Court will not, upon the question whether an appearance shall be entered for a defendant, enter into the question of jurisdiction. Therefore where a plaintiff moved for leave to enter an appearance for the defendant, her Majesty's Secretary of State for War, and the defendant appeared on such motion under protest, and raised the question as to the jurisdiction of the Court upon a bill submitting that the proper course would have been by petition of right, the Court refused to enter into the question of jurisdiction, and gave the plaintiff leave to enter an appearance for the defendant. [*Felkin v. Lord Herbert*] 608

#### PRIVILEGE.

Where a defendant who was the surviving partner in a firm of commission wine merchants being required to set out in his answer an account of the partnership assets, liabilities and dealings for

the six months preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the plaintiff excepted for insufficiency. The Court allowed the exception, and held that the defendant ought to have set out the account in a schedule in his answer, and that the objection that the names of the customers were privileged did not apply to such a case. [*Telford v. Ruskin*] . 148

#### PRIVILEGED COMMUNICATION.

Under the new practice it is not necessary to introduce charges suggesting imagined facts to found an interrogatory, so that where a bill charged the existence of a mortgage known to the plaintiff, but did not charge that there were others, an interrogatory, "whether there were others," was held to be correct. A plea of privilege by the answer, alleging that the defendant has acquired information as solicitor of A. B., acting as such in relation to the matters inquired after, but not alleging that he acquired it from the client, is insufficient. Where a bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief: Held, that a defendant cannot protect himself from answering on the ground that as to one branch of the relief the bill would be demurrable, for that would be a demurrer to the whole bill. [*Marsh v. Keith*] . . 342

#### PROCEEDING AGAINST SHAREHOLDER FOR DEBT DUE FROM COMPANY.

A shareholder in a company who

he acquired it from the client is insufficient. Where a bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief: Held, that a defendant cannot protect himself from answering, on the ground that as to one branch of the relief the bill would be demurrable, for that would be a demurrer to the whole bill. [*Marsh v. Keith*]

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3. Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper, such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary decree, allowing the defendant "necessary repairs and lasting improvements." A mortgagee in possession who had neglected or refused to render an account upon the demand of the mortgagor refused his costs up to the hearing. [*Powell v. Trotter*] . . . 388

4. A bill by executors to enforce performance of a contract entered into by the defendants with the testator for sale of leaseholds alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time and when the motion would, but for pressure of business, have been heard, there was no probate, but when the motion was actually heard, the probate was in Court. Held, that the defendants could not resist the motion upon the ground of demurrer. Although executors can make an assignment and give a receipt for purchase-money which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the

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evidence of title exists the executors cannot give a complete indemnity. [*Newton v. The Metropolitan Railway Company*] . 583

## PRACTICE.

1. Although a trustee may under the 4th Order of the 10th of June, 1848, present a petition under the Trustee Relief Act as to monies paid in by himself, the Court, in making an order on such petition, gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. [*Re Hutchinson's Trusts*]

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2. Where a defendant to a bill filed for an injunction to restrain the infringement of a patent, or for leave to bring an action at law, stated by his answer that the invention was not novel, and that the Plaintiff's patent was invalid; the Court on a motion by the plaintiff, without his having made an affidavit as to the novelty of the invention or validity of the patent, refused to grant him an injunction or to give leave to bring an action unless he produced a clear and distinct affidavit that the invention was novel and the patent valid, but allowed the motion to stand over for that purpose. [*Whitten v. Jennings*] . . 110

3. Where a bill was filed for the administration of the testator's estate, and sought to charge the representative of the testator's executrix on the balance of an account, and such representative had offered to pay a sum in full, but had refused to account, and there was a question on the construction of the will to be decided: Held, that the suit was properly

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- instituted by bill, and that the case was not one for an administration summons under the 45th sect. of the 15 & 16 Vict. c. 86, and therefore that the plaintiff was entitled to his costs. [*Smith v. Spilsbury*] . . . . . 151
4. Distringas discharged with costs where made applicable by the person who obtained the writ to a sum of stock which was not the particular stock mentioned in the affidavit on which the writ had been granted. General practice of the Bank of England with reference to writs of distringas observed upon. [*In re Cross*]. 580
5. Common order to revive granted to administrator of sole plaintiff by whose death it had become abated. [*Ward v. Shakeshaft*] 607
6. The Court will not, upon the question whether an appearance shall be entered for a defendant, enter into the question of jurisdiction. Therefore where a plaintiff moved for leave to enter an appearance for the defendant, her Majesty's Secretary of State for War, and the defendant appeared on such motion under protest, and raised the question as to the jurisdiction of the Court upon a bill submitting that the proper course would have been by petition of right, the Court refused to enter into the question of jurisdiction, and gave the plaintiff leave to enter an appearance for the defendant. [*Felkin v. Lord Herbert*] 608

#### PRIVILEGE.

Where a defendant who was the surviving partner in a firm of commission wine merchants being required to set out in his answer an account of the partnership assets, liabilities and dealings for

the six months preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the plaintiff excepted for insufficiency. The Court allowed the exception, and held that the defendant ought to have set out the account in a schedule in his answer, and that the objection that the names of the customers were privileged did not apply to such a case. [*Telford v. Ruskin*] . 148

#### PRIVILEGED COMMUNICATION.

Under the new practice it is not necessary to introduce charges suggesting imagined facts to found an interrogatory, so that where a bill charged the existence of a mortgage known to the plaintiff, but did not charge that there were others, an interrogatory, "whether there were others," was held to be correct. A plea of privilege by the answer, alleging that the defendant has acquired information as solicitor of A. B., acting as such in relation to the matters inquired after, but not alleging that he acquired it from the client, is insufficient. Where a bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief: Held, that a defendant cannot protect himself from answering on the ground that as to one branch of the relief the bill would be demurrable, for that would be a demurrer to the whole bill. [*Marsh v. Keith*] . . 342

#### PROCEEDING AGAINST SHAREHOLDER FOR DEBT DUE FROM COMPANY.

A shareholder in a company who

was also a creditor of the company, obtained a judgment against the company for money due to him. The assets of the company had been assigned to another company, of which he had become a shareholder, and not being able to obtain payment of his debt he gave notice under the 68th section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), to another shareholder in the first company, who had not become a shareholder in the second company, that he should proceed against him individually to recover the debt. Upon a bill for an injunction by the shareholder so proceeded against to restrain the proceedings at law, but without asking other relief: Held, that a Court of Common Law had full jurisdiction to deal with the case, and the injunction was refused with costs. [*Hardinge v. Webster*]

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#### PURCHASE BY MORTGAGEE.

Where a first mortgagee under his power of sale sold the mortgaged premises by private contract to second mortgagees, who were mortgagees in possession and also trustees for sale for the mortgagor, and the mortgage deed required that, before any sale should be made, three months notice should be given to the mortgagor, and contained a clause, that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees, at the time they purchased, knew that the three months' notice had not been given to the mortgagor,

he having died some time before, and no administration having then been taken out to his estate. Upon a suit for redemption by the mortgagor's administratrix: Held, that she was entitled to redeem, and that the clause, discharging a purchaser from ascertaining whether proper notice had been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given. There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. [*Parkinson v. Hanbury*] . . . . 143

#### RAILWAY COMPANY.

1. Where a railway company served a landowner with notice of their intention of taking a portion of certain property belonging to him for the purposes of their railway, and the landowner served upon the company a counter notice requiring them to take the whole of such property.: Held, that the company could not take possession of any portion of the property until they had deposited the value of the whole property in the bank; and that it was not sufficient for them to deposit the value of that portion only of the land taken by them. [*Giles v. L. C. D. Rail. Co.*] 406
2. Where a notice to treat for the purchase of certain property was served by a railway company on the owner of such property, and nothing further was done until after the death of the owner, who by his will had specifically devised the property comprised in the notice to treat: Held, 1st, that the mere notice to treat served by the company did not constitute a contract by the owner for the

sale of the property ; 2ndly, that if it did, a bill for specific performance would not lie against the owner, and therefore, that the notice to treat did not effect conversion of the property comprised in the notice. [*Haynes v. Haynes*]

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3. Where land is taken by a railway company under the compulsory powers of the Lands Clauses Consolidation Act, and the purchase-money is paid into Court, all the costs occasioned thereby must be paid by the railway company, although some of such costs may have been occasioned by the existence of a suit, of which the land taken was the subject. Therefore, where land which formed the subject of a suit was taken by a railway company, and a petition was presented in the suit, and also in the matter of the act, for the re-investment of the purchase-money, which had been paid into Court, the company were ordered to pay the costs of the tenant for life and remaindermen in the land taken by them who were parties to the suit and served with the petition; and they were also ordered to pay the costs of former proceedings in the suit which had been occasioned by the company's taking the land. [*Haynes v. Barton*] . . . 433

### REAL ESTATE.

A testatrix, being possessed of three estates, by her will devised one of those estates by name, and all other her lands and tenements whatsoever and wheresoever, and, by a codicil executed on the same day, specifically devised her two other estates to different persons. Held, that the will and codicil were executed to carry out one intention; that the will must be read

as if it contained an express exception of the two estates devised by the codicil; that the estate devised by name in the will was specifically devised; and that the devise in the will was residuary so far only as related to after-acquired property, and therefore that all three estates must contribute rateably to the payment of debts, the personal estate being insufficient. A residuary devise of real estate since the Wills Act (1 Vict. c. 26) is not specific. [*Barnwell v. Iremonger*] . . . 242

### RECEIVER.

Where a person becomes entitled under a will to copyholds, whether by remainder, originally vested or by contingent remainder, or executory devise, which has become vested by the happening of the contingency, he comes in directly under the will, and therefore as between himself and the lord of the manor, he is entitled to the benefit of the admittance of the first devisee under the will. The Court will not allow the possession of a receiver appointed by the Court to be disturbed without the leave of the Court. [*Randfield v. Randfield*] 310

### RECTIFYING DEED.

Where a marriage settlement is prepared, pursuant to the intention of *one of the parties*, but under a mistake *as to the other*, it cannot be rectified. [*Sells v. Sells*] . 42

### REDEMPTION.

Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements,

which the mortgagor objects to as being unnecessary and improper, such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary decree allowing the Defendant necessary repairs and lasting improvements. A mortgagee in possession who had neglected or refused to render an account upon the demand of the mortgagor, refused his costs up to the hearing. [*Powell v. Trotter*] 388

#### REFERENCE AS TO SETTLEMENT.

Where a ward of Court, who was entitled to a fund on attaining twenty-one, married without the consent of the Court, and no settlement was made on the marriage; and afterwards, having attained twenty-one, together with her husband, petitioned the Court for the payment of the fund to her husband: the Court refused to make an order for payment to the husband, but directed a reference as to a settlement. [*Gynn v. Gilbard*] . . . . . 356

#### REMOVAL OF TRUSTEES.

The Court will exercise its discretion as to whether it will order the removal of a trustee on the ground of bankruptcy, under the 130th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. cap. 106), and it is not sufficient merely to show the fact of bankruptcy to induce the Court to make such an order. Therefore where a trustee became bankrupt in 1855, and in 1856 obtained a first-class certificate, and had since been appointed to a position of trust, and in 1860 a petition was presented for his removal on the

ground of his bankruptcy in 1855 and also on the ground of vexatious conduct, but the petition did not allege that his continuing in the trust would endanger the trust property: Held, that it was not compulsory on the Court to make an order for the removal of such trustee, but that it had a discretion and dismissed the petition with costs. In all cases where jurisdiction is given to the Court by act of parliament by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the Court a discretion in the exercise of that jurisdiction. Charges of vexatious conduct as a ground for the removal of a trustee must be made by bill and not by petition. [*Re Bridgman*] . . . . . 164

#### RESIDUARY BEQUEST.

A testator gave to his son all his furniture, plate, &c. and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease, and in a subsequent part of the will he bequeathed to his trustees "all my property as well real and personal or mixed not hereinbefore disposed of:" Held, that although the words "goods and chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary. The testator also gave a legacy of 500*l.* £3 per Cent. Consols or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as



much sterling money as that amount of stock would have been worth at his decease; and by a subsequent clause the testator gave another legacy of like stock to the same person "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate: Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general. Distinction between specific, demonstrative and general legacies. An annuity is included under the term "legacy." [*Mullins v. Smith*]

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### RESIDUARY DEVISE.

A testatrix being possessed of three estates, by her will devised one of those estates by name, and all other her lands and tenements whatsoever and wheresoever, and, by a codicil executed on the same day, specifically devised her two other estates to different persons. Held, that the will and codicil were executed to carry out one intention; that the will must be read as if it contained an express exception of the two estates devised by the codicil; that the estate devised by name in the will was specifically devised, and that the devise in the will was residuary so far only as related to after-acquired property; and therefore that all three estates must contribute rateably to the payment of debts, the personal estate being insufficient. A residuary devise of real estate, since the Wills Act (1 Vict. c. 26), is not specific. [*Barnwell v. Irmonger*] . . . . . 242

### RESIDUARY DEVISE OF REALTY.

A residuary devise of real estate since the Wills Act (1 Vict. c. 26) is not specific. Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of the debts, in priority to the real estates specifically devised. [*Dady v. Hartridge*] 236

### RESIDUE.

Where a testatrix appointed 600*l.* to a trustee upon trust to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient: Held, that the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that therefore the legacies to the daughters must be paid in priority, and were not liable to abate *pari passu* with the residue. [*Harley v. Moon*]

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### RESTRAINT ON ANTICIPATION.

Where an annuity was given to an executrix, who was a married woman, to her separate use without power of anticipation, and such

executrix had misappropriated assets of the testatrix: Upon a suit for the administration of the testatrix's estate, the Court held, that in taking the accounts, payments of the annuity, which were in arrear, were liable to be applied to make good the executrix's misappropriations, but that the future payments, being subject to the restraint on anticipation, were not so liable. [*Pemberton v. M'Gill*] 266

### REVIVOR.

Common order to revive granted to administrator of sole Plaintiff, by whose death the suit had become abated. [*Ward v. Shakeshaft*] 607

### ROYALTIES.

The Apportionment Act applies to a case of the expiration of a term in trustees to accumulate rents for payment of debts, legacies and other charges, with remainder to a tenant for life; as well as to the common case of an estate for life to A., remainder to B. And the term being for twenty-one years from the testator's death, the *Thelusson* Act does not apply to prevent apportionment. But the Apportionment Act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents, payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine. [*St. Aubyn v. St. Aubyn*] . . . 611

### SALE BY MORTGAGEE.

Where a first mortgagee under his power of sale sold the mortgaged premises by private contract to second mortgagees, who were

mortgagees in possession and also trustees for sale for the mortgagor, and the mortgage deed required that, before any sale should be made, three months' notice should be given to the mortgagor, and contained a clause, that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees, at the time they purchased, knew that the three months' notice had not been given to the mortgagor, he having died some time before, and no administration having then been taken out to his estate. Upon a suit for redemption by the mortgagor's administratrix: Held, that she was entitled to redeem, and that the clause, discharging a purchaser from ascertaining whether proper notice has been given, does not protect a purchaser who purchases with actual knowledge that such notice has not been given. There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. [*Parkinson v. Hanbury*] . . . 143

### SCHEDULE TO ANSWER.

Where a Defendant, who was the surviving partner in a firm of commission wine-merchants, being required to set out in his answer an account of the partnership assets, liabilities and dealings for the six months preceding the death of the deceased partner, set out the account in a book, which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the

Plaintiff excepted for insufficiency: the Court allowed the exception, and held, that the Defendant ought to have set out the account in a schedule to his answer, and that the objection, that the names of the customers were privileged, did not apply to such a case. [*Telford v. Ruskin*] . 148

### SCOTCH LAW.

In a case of conflict of opinions on a question of pure and difficult Scotch law, the Court will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scotch Court. But it is matter of discretion in this Court. Mode in which the case is prepared. [*Lord v. Colvin*] . 24

### SEPARATE ESTATE.

Where an annuity was given to an executrix, who was a married woman, to her separate use without power of anticipation, and such executrix had misappropriated assets of the testatrix: Upon a suit for the administration of the testatrix's estate, the Court held, that in taking the accounts, payments of the annuity, which were in arrear, were liable to be applied to make good the executrix's misappropriations, but that the future payments, being subject to the restraint on anticipation, were not so liable. [*Pemberton v. M'Gill*] 266

### SERVICE.

The words "every application" in the 17th section of the Settled Estates Act (19 & 20 Vict. c. 120) refer only to applications under the act for the sale of estates, and and not to petitions dealing with

purchase-money. [*Re Duke of Cleveland's Harte Estates*] . 481

### SERVICE ABROAD.

The Court has no authority under the 7th rule of the 10th Consolidated Order to order the service abroad of an administration summons. [*Lester v. Bond*] . 392

### SET-OFF.

A. and his wife and children were entitled under a settlement to 1,500*l.* charged on real estate of which B. was tenant for life, the 1,500*l.* was the wife's property vested in trustees for the husband for life, with usual remainders. A. was indebted to B. for money advanced for the wife. Held, that on raising the charge, B. could not set off his claim against A.'s life interest. [*Jenner v. Morris*] 334

### SETTLED ESTATES ACT, 1856 (19 & 20 Vict. c. 20).

The Regulations of the 8th of August, 1857, are not absolutely binding as orders. Therefore, though those Regulations direct that a guardian to an infant Petitioner must be appointed before the petition is presented, the Court authorized such an appointment on an application after the petition had been presented and answered. [*Re Longstaffe's Settled Estates*] . 142

### SETTLEMENT.

Where a marriage settlement is prepared, pursuant to the intention of *one of the parties*, but under a mistake *as to the other*, it cannot be rectified. [*Sells v. Sells*]: . 42

SETTLEMENT.

1. Where a lady at the date of her marriage was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them, in right of the wife, should "by gift, descent, succession or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture: Held, that the words, "become entitled," imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of the coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant, but that the wife having been absolutely entitled to the two sums of stock at the date of the marriage, and there having been no subsequent change in her interest, those sums of stock did not come within the terms of the covenant. [*Archer v. Kelly*] . . . . . 300
2. Where a covenant to settle after-acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession; and who afterwards became entitled to

property to her separate use, as to part of which there was a proviso against alienation: Held, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it. [*Brooks v. Keith*] . . . . 462

SETTLEMENT BY WILL.

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue: and he gave his residue to A. for life, remainder to B.: Held, 1. That the testator had made a positive settlement, and the Court could not add to it in any way. 2. That the income undisposed of after the wife's death fell into the residue. 3. That it was undisposed of income merely, and passed as such to the tenant for life of the residue. [*Fullerton v. Martin*]

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SETTLEMENT BY THE COURT.

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the

mother should be then dead; but if not, then not until after her decease; and if no child should live to attain a vested interest, then to fall into his residue: and he gave his residue to A. for life, remainder to B.: Held, 1. That the testator had made a positive settlement, and the Court could not add to it in any way. 2. That the income undisposed of after the wife's death fell into the residue. 3. That it was undisposed of income merely, and passed as such to the tenant for life of the residue. [*Fullerton v. Martin*] . . . . . 31

#### SOLICITOR AND CLIENT.

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor. An acknowledgment of a debt contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter and others, or "obtaining a release of my liabilities in respect of such debts: Held, not to amount to a promise to pay the debts, and therefore not to take the debt out of the Statute of Limitations. [*In re Hindmarsh*] . . . . . 129

#### SPECIFIC DEVISE.

A residuary devise of real estate since the Wills Act (1 Vict. c. 26) is not specific. Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of the debts, in priority to the real estates specifically devised. [*Dady v. Hart-ridge*] . . . . . 236

#### SPECIFIC LEGACY.

A testator gave to his son all his furniture, plate, &c., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease; and in a subsequent part of the will he bequeathed to his trustees "all my property as well real and personal or mixed, not hereinbefore disposed of." Held, that although the words "goods and chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific and not residuary. The testator also gave a legacy of 500*l.* £3 per cent. Consols or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as that amount of stock would have been worth at his decease; and by a subsequent clause the testator gave another legacy of like stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate. Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general. Distinction between specific, demonstrative and general legacies. An annuity is included under the term "legacy." [*Mullins v. Smith*]

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#### SPECIFIC LEGATEE.

Where a testator takes shares in a company, any payments remaining

due at, or becoming due after, his death, which are necessary to constitute him a complete shareholder, must be paid by his general personal estate; but if he was a complete shareholder, payment of calls made after the testator's death, must be made by the specific legatee of the shares. [*Day v. Day*] . . . . . 261

### SPECIFIC PERFORMANCE.

When a company issues a prospectus, a party contracting to take shares on the statements therein contained has a right not only not to be misled by any statements actually false, but to be informed of all the facts, the knowledge of which might reasonably have deterred him from so contracting. And if the prospectus in that sense contains misrepresentations, or the absence of true representation, the contract will not be enforced. What concealment or ambiguity amounts to misrepresentation. Semble, that when a person contracts to take shares, but has not done specific acts necessary under an act of parliament to make him a shareholder at law, equity will enforce the contract, and compel him to do those acts. [*The New Brunswick and Canada Railway and Land Company v. Muggenridge*] . . . . . 363

### STATUTE.

In a case of conflict of opinions on a question of pure and difficult Scotch law, the Court will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scotch Court. But it is matter of discretion in this Court. Mode in which the case is prepared. [*Lord v. Colvin*] . 24

### STAY OF PROCEEDINGS.

The stay of proceedings pending an appeal is in the discretion of the Court. Where the Court has no judicial doubt upon the decree, it will not in general stay proceedings. But where an order was made for payment of a large sum to A., and it was in evidence that A. had heavily encumbered his interest, and part of the decree was made in conformity with the decision of a Scotch Court, on a case sent to it, as to which the Court could form no judicial opinion, stay of proceedings was ordered pending an appeal. [*Lord v. Colvin*] . . . . . 475

### SPECIFIC DEVISE.

A testatrix being possessed of three estates, by her will devised one of those estates by name, and all other her lands and tenements whatsoever and wheresoever, and, by a codicil executed on the same day, specifically devised her two other estates to different persons. Held, that the will and codicil were executed to carry out one intention, that the will must be read as if it contained an express exception of the two estates devised by the codicil, that the estate devised by name in the will was specifically devised, and that the devise in the will was residuary so far only as related to after-acquired property; and therefore that all three estates must contribute rateably to the payment of debts, the personal estate being insufficient. A residuary devise of real estate, since the Wills Act (1 Vict. c. 26), is not specific. [*Barnwell v. Ironmonger*] . . . . . 242

### SPECIFIC PERFORMANCE.

Leasehold property was sold by

auction on the 8th of June, 1858, with a condition for completion on the 20th of July following. The title was accepted by the purchaser on the 16th of July, but owing to disputes as to the value of the fixtures, the meeting for completion did not take place till the 26th of August. The purchaser then discovered that the vendors had renewed the insurance, which expired on the 24th of June, for one month only, so that the property became uninsured on the 24th of July, and thereupon became forfeited to the lessors. On the 7th of September, the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and the purchaser refusing to complete, they filed a bill for specific performance. Held, that although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the Court would not decree specific performance, and the bill was dismissed, but without costs. [*Dowson v. Solomon*] . . . . . 1

## STATUTE OF LIMITATIONS.

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor. An acknowledgment of a debt contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter and others, or "obtaining a release of my liabilities in respect of such debts:" Held, not to amount to a promise to pay the debts, and therefore not to take the debts

out of the Statute of Limitations. [*In re Hindmarsh*] . . . . 129

## STATUTES.

A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. An act authorizing the making of a railway through land abounding with minerals contained a clause reciting the nature of the lands, and that the railway would intercept and obstruct the free intercourse between the adjacent lands, and so deprive them of their natural advantages; and it gave liberty to owners or occupiers to make any railway across the company's railway, "for the benefit of themselves and for all and every other person or persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require." Held, by Mr. Baron Channell and Vice-Chancellor Kindersley, dissentiente Willes, J., that this power was confined to making a railway for the purposes of their own business in respect of the lands, and did not authorize the making of a railway for the purpose of carrying passengers and goods for hire. [*Hughes v. Chester and Holyhead Railway Company*] . . . . . 524

## STATUTES

(1 & 2 VICT. c. 110, s. 13).

Testator limited real and personal estate to trustees for A. B. for life, with a limitation over in case he should thereafter become bankrupt or insolvent, &c., or if by his act or default the rents, &c., should

become vested in or payable to any other person. The tenant for life was insolvent before the date of the will. There was the usual power of attorney, and judgment was entered up, but nothing further done, and the tenant for life did not in any manner alienate after the date of the will. Held, 1. That judgment without more only operated as an equitable charge, and did not vest the rents in or make them payable to the assignees. 2. That upon the authorities, and in particular *Manning v. Chambers*, the insolvency before the date of the will was within the words "shall thereafter become bankrupt," &c. [*Seymour v. Lucas*] . . . 177

#### SUBSTITUTED REPRESENTATION.

Order made under the 44th section of the 15th & 16th Vict. c. 86, in a creditors' suit, for the appointment of a person to represent the deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that, after payment of incumbrances out of the proceeds of the sale, no surplus would be left, and upon notice being given to the debtor's next of kin who were entitled to take out administration. [*Davies v. Boulcott*] . . . . . 23

#### SUBSTITUTION.

Gift of aliquot parts of a fund to the children of A., the children of B., the children of C. and the grandchildren of D. Provided that if any child or children of A., or B. or C., or any of the grandchildren of D., *shall die* in my lifetime leaving a child or children living at my death and attaining twenty-

one, the child or children of each such *child or grandchild* so dying in my lifetime *shall represent and stand in the place of* his, her or their deceased parent or respective parents, and be entitled to the same share or shares *which his, her or their deceased parent would have been entitled to if living at my decease*: Held, 1. The word "children" could not be read grandchildren, so as to let in, as original donee, the child of a deceased child of A. who never had a child living at the date of the will. 2. The words "shall die" do not import future dying, but are equivalent to "shall be dead," or "shall have died." 3. A testator may so express himself as to cause a child of a deceased child to *represent* and be substituted for that deceased child; though he never intended a share for the deceased child:—and, Held, that, in this case, the proviso was large enough to show an *intention*, that a child of a child deceased *at the date of the will*, and for whom therefore no share was intended, should represent or be substituted for that deceased child, and take the share, which if living at the date of the testator's death, the deceased child would have taken. *Christopherson v. Naylor*, and other cases of that class, distinguished; and *Waugh v. Waugh* disapproved and overruled. [*Loring v. Thomas*] . . . . 497

#### SUIT BY BILL.

Where a bill was filed for the administration of the testator's estate, and sought to charge the representative of the testator's executrix, on the balance of an account, and such representative had offered to pay a sum in full, but had



refused to account, and there was a question on the construction of the will to be decided: Held, that the suit was properly instituted by bill; and that the case was not one for an administration summons under the 45th sect. of the 15 & 16 Vict. c. 86, and therefore that the Plaintiff was entitled to his costs. [*Smith v. Spilsbury*]

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### SUPPLEMENTAL BILL.

A Plaintiff in a suit was convicted by a foreign court of felony, and a curator had been appointed of his estate, who, in accordance with the law of such foreign country, by virtue of his office fully represented him: Held, upon motion for a supplemental order, that there was no such transmission of interest as would come within the 52nd section of the Chancery Amendment Act, and that it was necessary to file a supplemental bill. [*Guillon v. Rotch*] . . 621

### TENANT FOR LIFE AND REMAINDERMAN.

A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue: and he gave his residue to A. for life, remainder to B. Held, 1. That the testator had made a positive settlement, and the Court could not add to it in

any way. 2. That the income undisposed of after the wife's death fell into the residue. 3. That it was undisposed of income merely, and passed as such to the tenant for life of the residue. [*Fullerton v. Martin*] . . . . . 31

### THELLUSSON ACT.

The Apportionment Act applies to the case of the expiration of a term in trustees to accumulate rents for payment of debts, legacies and other charges, with remainder to a tenant for life, as well as to the common case of an estate for life to A., remainder to B. And the term being for twenty-one years from the testator's death, the *Thellusson* Act does not apply to prevent apportionment. But the Apportionment Act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine. [*St. Aubyn v. St. Aubyn*] . . . 611

### TIMBER.

A. B. died intestate, seised of real estates, under which were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed in May, 1845, by his infant daughter and heiress at law, by her next friend, for the administration of his estate, it was, by the order of the Court, on further directions, dated the 24th of May, 1846, declared, that the intestate's widow was entitled to dower out of his freehold estates, and it was referred back to the Master to inquire what was

due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the real estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into Court, to the account of the infant Plaintiff, and the Master was ordered to prosecute an inquiry, directed by the decree on the hearing (dated the 12th of December, 1845), respecting the leasing the intestate's estates for coal mines. Under an order of the Court of the 7th of March, 1855, the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. On the 28th of April, 1855, the widow again married. On the 23rd of April, 1856, the Master, by his report, found it would be fit that the whole estate should be let for coal mines. On the 8th of May, 1856, an order was made, approving of a provisional agreement entered into for a lease, and directing that the agreement should be carried out by a lease to be settled by the Judge in chambers. A lease dated the 15th day of November, 1857, was settled in chambers, in which the infant Plaintiff granted and demised, and the widow, as guardian, with the consent of her second husband, granted, demised, leased and confirmed, all the mines under the estate, except within a certain area round a house, the rents and royalties, (and, amongst others, a rent or sum of 4*l.* 4*s.* for every acre of the surface used for raising coal, &c.), being reserved to the infant Plaintiff. All the covenants were entered into by or with the infant.

Held, 1st, that the proceedings which had taken place in the suit did not amount to an assignment of dower. 2ndly. That the widow was entitled, in respect of her dower, to one-third of the yearly income which had arisen, or might arise, from the amount of the purchase-money of poles and small timber cut and sold under the direction of the Court. 3rdly. That as the lease was intended to be made for the benefit of the infant alone, the widow was not entitled, in respect of dower, to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her husband, the intestate. Held, also, that until an assignment, the widow was entitled to one-third of the rents of the real estate of the land, exclusive of the rents and profits of the mines, but inclusive of the rents paid by the lessees for any portion of the surface of the land used for the purpose of the mines. And semble, that a widow dowable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third of the royalties as corpus. [*Dickin v. Hamer*] . . . . 284

#### TRANSMISSION OF INTEREST.

A Plaintiff in a suit was convicted by a foreign court of felony, and a curator had been appointed of his estate, who, in accordance with the law of such foreign country, by virtue of his office fully represented him. Held, upon motion for a supplemental order, that

there was no such transmission of interest as would come within the 52nd section of the Chancery Amendment Act, and that it was necessary to file a supplemental bill. [*Guillon v. Rotch*] . . 621

### TRUSTEE.

Although a trustee may under the 4th Order of 10th June, 1848, present a petition under the Trustee Relief Act as to monies paid in by himself, the Court in making an order on such petition gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. [*Re Hutchinson's Trusts*] . . 27

### TRUSTEE SOLICITOR.

The rule, that a solicitor trustee acting in the trusts shall not be allowed profit costs, is not restricted to cases of express trust, but applies to the case of an executor or trustee, though there be no express trust. Profit costs disallowed an executor who had acted as his own solicitor upon an objection taken by a creditor who was a party to the suit. [*Pollard v. Doyle, Kearns v. Doyle*] . 319

### TRUSTEES' COSTS.

Where an infant is entitled to appear as respondent on a petition, whether in a matter or a cause, he must appear by a duly constituted guardian *ad litem*. Costs of trustees who had been served and appeared on a petition by a tenant for life for investments of railway purchase-monies allowed against the company. [*In re Duke of Cleveland's Harte Estates*] . . 46

### UNDISPOSED OF PERSONALTY.

Where personalty was bequeathed to persons upon trust for a charity which failed under the Mortmain Act, and there were no next of kin: Held, that the executor was trustee for the Crown. [*Dacre v. Patrickson*] . . . . . 182

### UNMARRIED.

A fund was devised by will to A. for life, and after her decease to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the Statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried. A. subsequently married and had eight children, but died a widow, and without having appointed the fund. Upon a petition by the children of A. claiming the fund: Held, that "unmarried" meant not having a husband at the time of her death, and therefore that the children of A., and not the persons who would have been entitled to A.'s personal estate if she had died without ever having been married, were entitled to the fund. [*Day v. Barnard*] . . . . . 351

### VENDOR AND PURCHASER.

Leasehold property was sold by auction on the 8th of June, 1858, with a condition for completion on the 20th of July following. The title was accepted by the purchaser on the 16th of July, but owing to disputes as to the value of the fixtures, the meeting for completion did not take place till the 26th of August. The pur-

chaser then discovered that the vendors had renewed the insurance, which expired on the 24th of June, for one month only, so that the property became uninsured on the 24th of July, and thereupon became forfeited to the lessors. On the 7th of September, the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and the purchaser refusing to complete, they filed a bill for specific performance: Held, that although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the Court would not decree specific performance, and the bill was dismissed, but without costs. [*Domsen v. Solomon*] . . . . . 1

#### VENDOR'S LIEN.

Costs incurred in selling real estate in an administration suit, before decree, charged on such real estate, and not on the personal estate. Where it is ordered that real estates, which are charged with incumbrances, shall contribute rateably to the payment of costs, such estates must be valued for the purposes of such contribution at the net values after payment of incumbrances. Where the Court had declared that certain devised estates were devised subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates, the Court held, that under the circumstances of the case the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on Vol. I.

which it attached. [*Barnwell v. Iremonger*] . . . . . 255

#### VESTED INTEREST CAPABLE OF BEING DIVESTED.

A defendant trustee was in contempt for not answering and out of the jurisdiction. It appeared that he had gone out of the jurisdiction to avoid answering; that he had sold out the trust fund to an amount exceeding 20,000*l.*; that he had come from Boulogne with a return ticket, and intended to depart shortly, and that he had in fact been arrested at the station on the day before the motion for a *ne exeat* was made, while attempting to depart. The order for a writ of *ne exeat* was made. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*. [*Honkins v. Honkins*] 75

#### VESTING.

A testator gave a legacy upon the death of his granddaughter to her child or children, to be paid to such child or children at his, her or their respective ages of twenty-one years, and directed that the shares of such child or children as at the time of his granddaughter's death should be under the age of twenty-one years should bear interest at the rate of 5*l.* per cent. and charged the legacy on his residuary real and personal estate, and the personal estate was deficient. The granddaughter died, leaving one child, who afterwards died under twenty-one. Held, that the legacy sank into, and was not raiseable out of, the testator's

real estate. [*Parker v. Hodgson*]  
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### VEXATIOUS CONDUCT.

The Court will exercise its discretion as to whether it will order the removal of a trustee on the ground of bankruptcy, under the 130th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and it is not sufficient merely to show the fact of bankruptcy to induce the Court to make such an order. Therefore, where a trustee became bankrupt in 1855, and in 1856 obtained a first-class certificate, and had since been appointed to a position of trust, and in 1860 a petition was presented for his removal on the ground of his bankruptcy in 1855, and also on the ground of vexatious conduct; but the petition did not allege that his continuing in the trust would endanger the trust property. Held, that it was not compulsory on the Court to make an order for the removal of such trustee, but that it had a discretion and dismissed the petition with costs. In all cases where jurisdiction is given to the Court by act of parliament by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the Court a discretion in the exercise of that jurisdiction. Charges of vexatious conduct as a ground for the removal of a trustee must be made by bill, and not by petition. [*Re Bridgman*] 164

### WARD OF COURT.

Where a ward of Court, who was entitled to a fund on attaining

twenty-one, married without the consent of the Court, and no settlement was made on the marriage; and afterwards, having attained twenty-one, together with her husband petitioned the Court for the payment of the fund to her husband; the Court refused to make an order for payment to the husband, but directed a reference as to a settlement. [*Gynn v. Gilbard*]  
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### WIFE'S EQUITY TO A SETTLEMENT.

Where a person entitled to a share in a fund in Court and her incumbrancer or assignee are before the Court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. In giving effect to the wife's equity to a settlement of a fund in Court, the rule of settling half on the wife is departed from, either where the fund is very small and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife without appropriation for her maintenance. Where the fund settled by the Court has been assigned, the Court, after providing for the wife and her children, declares an ultimate trust, in case of the wife dying in the husband's lifetime without issue, in favour of the assignee. [*Ward v. Yates*] . 80

### WILL.

1. A testator bequeathed the residue of his estate to trustees, upon trust to transfer one moiety to his sister, and the other moiety to his three

- brothers, *Richard, James Jenkinson* and *John*, and directed that "should not my said brother *Richard Green*, who is supposed to be now alive and resident in *Australia*, make any claim to the shares and interests in the said several trust monies to which he may become entitled under this my will within the time or space of three years next after my decease," then the trustees were at the expiration of such three years to transfer "the shares and interests of the said *Richard Green*," unto his sister and two brothers, *James Jenkinson* and *John*, in equal shares. *Richard Green* died in the lifetime of the testator. Held, that *Richard Green's* share in the residue did not lapse by his death without claiming it, but that it passed by the gift over to the sister and two surviving brothers. [*Re Green's Estate*] . . . . . 68
2. A gift of a life estate to a person who would be the testator's next of kin at his death, with remainder over to his next of kin, excluding some of the persons who would be some of his next of kin, does not exclude the donee of the life estate from taking under the gift to the next of kin. [*Lee v. Lee*] . . . . . 85
3. Testator limited real and personal estate to trustees for A. B. for life; with a limitation over in case he should *thereafter* become bankrupt or insolvent, &c., or if by his act or default the rents, &c. should *become vested in or payable* to any other person. The tenant for life was insolvent before the date of will; there was the usual power of attorney, and judgment was entered up, but nothing further done, and the tenant for life did not in any manner alienate after the date of the will. Held: 1. That judgment, without more, only operated as an equitable charge, and did not vest the rents in or make them payable to the assignees. 2. That upon the authorities, and in particular *Manning v. Chambers*, the insolvency before the date of the will was within the words "shall *thereafter* become bankrupt," &c. [*Seymour v. Lucas*] 177
4. Where a testator bequeathed personalty "equally between the heirs of my late uncle *William Neve*, *John Neve* and my aunt *Penelope Francis*," all three of whom were dead at the date of the will. Held, that the heirs at law of those three persons living at the death of the testator, and not their next of kin, were entitled. The decision in *Evans v. Salt* (6 Beav. 267) disapproved of. [*In re Rootes*] . . . . . 228
5. A residuary devise of real estate since the Wills Act (1 Vict. c. 26) is not specific. Therefore, where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of the debts, in priority to the real estates specifically devised. [*Dady v. Hartridge*] 236
6. A fund was devised by will to A. for life, and, after her decease, to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried. A. subsequently married and had eight children, but died a widow, and without having appointed the fund.

- Upon a petition by the children of A. claiming the fund: Held, that "unmarried" meant not having a husband at the time of her death, and therefore that the children of A., and not the persons who would have been entitled to A.'s personal estate if she had died without ever having been married, were entitled to the fund. [*Day v. Barnard*] . . . . . 351
7. A testator gave the interest of a sum of stock to his daughter, and after her death, gave the stock to the child or children of his daughter on their attaining the age of twenty-one years, and directed that in the event of his daughter dying without leaving issue, the stock should revert to his son. The will also contained a provision for the testator's son. The testator's daughter died leaving one child, who subsequently died under the age of twenty-one, having received a maintenance out of the said stock. Held, that the gift to the children of the testator's daughter was contingent on their attaining twenty-one, and that on the death of the child of the testator's daughter, under twenty-one the stock reverted to the testator's son. [*In re Wrangham's Trust*] . . . 358
8. A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons, and gave the same to his trustees upon trust at their uncontrolled discretion to apply the same or such parts thereof as they should think proper for the personal maintenance and support or otherwise for the benefit of his said son, or otherwise to apply the same in augmentation of the shares of the testator's other children. The trustees did not exercise the power, but paid the share in question into Court under the Trustee Relief Act. Held, that there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Brown v. Higgs* (4, 5, 8 Ves.), no gift could be implied, and therefore that there was an intestacy with respect to the share. [*Re Eddowes*] . . . . . 395
9. Gift of aliquot parts of a fund to the children of A., the children of B., the children of C. and the grandchildren of D. Provided that if any child or children of A. or B. or C. or any of the grandchildren of D. shall die in my lifetime, leaving a child or children living at my death and attaining twenty-one, the child or children of each such child or grandchild so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and be entitled to the same share or shares which his, her or their deceased parent would have been entitled to if living at my decease. Held, 1. The word "children" could not be read "grandchildren," so as to let in as original donee the child of a deceased child of A., who never had a child living at the date of the will. 2. The words "shall die" do not import future dying, but are equivalent to "shall be dead" or "shall have died." 3. A testator may so express himself as to cause a child of a deceased child to represent and be substituted for that deceased child, though he never intended a share for the deceased child: — and held, that in this case the proviso was large enough to show an intention that a child of a

child deceased at the date of the will, and for whom therefore no share was intended, should represent or be substituted for that deceased child, and take the share which, if living at the date of the testator's death, the deceased child would have taken. *Christopherson v. Nayler*, and other cases of that class, distinguished, and *Waugh v. Waugh* disapproved and overruled. [*Loring v. Thomas*] . . . . 497

10. Where a testatrix appointed 600*l.* to a trustee upon trust to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient. Held, that the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that therefore the legacies to the daughters must be paid in priority, and were not liable to abate *pari passu* with the residue. [*Harley v. Moon*] . . . . 623

### WILL AND CODICIL.

- A testatrix being possessed of three estates, by her will devised one of those estates by name, and all other her lands and tenements whatsoever and wheresoever, and, by a codicil executed on the same

day, specifically devised her two other estates to different persons. Held, that the will and codicil were executed to carry out one intention; that the will must be read as if it contained an express exception of the two estates devised by the codicil; that the estate devised by name in the will was specifically devised; and that the devise in the will was residuary so far only as related to after-acquired property; and therefore that all three estates must contribute rateably to the payment of debts, the personal estate being insufficient. A residuary devise of real estate, since the Wills Act (1 Vict. c. 26), is not specific. [*Barnwell v. Irsmonger*] . . . . . 242

### WINDING UP.

The directors of a company transferred all its assets, liabilities and business to another company under a deed of amalgamation, by which it was provided, that the shareholders in the old company should exchange their shares for shares in the new company, and that the new company should indemnify the old company in respect of all its debts and liabilities. Some only of the shareholders in the old company executed the deed of amalgamation and became shareholders in the new company. The new company disputed their liability to carry out the arrangement for the amalgamation, and did not pay the debts of the old company, and actions were brought against the old company. The new company subsequently assigned their business, but not their assets, to another company. Upon a petition for the winding up of



the old company, presented by a shareholder in the new company who had originally been a shareholder in the old company, and which was supported by the shareholders of the old company who had executed the deed of amalgamation, but opposed by those who had not, the Court refused to order the old company to be wound up, and dismissed the petition, with costs as against those shareholders who had been served, but without costs as against those shareholders who had voluntarily appeared. A shareholder in the new company gave notice to a third company, to whom the new company had assigned its business, not to pay certain monies due from them to the new company, in consequence of which litigation ensued. The shareholder then presented his petition to wind up the new company. Held, that the existence of suits against the company was not *per se* proof of its insolvency, and the petition was ordered to stand over, with liberty to apply. [*In re Anglo-Australian and Universal Family Life Assurance Company, Ex parte Smith*]

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### WINDING-UP ACTS.

1. A person in 1844 bought shares in a banking company and had them transferred to him. The company afterwards registered under the 20 & 21 Vict. c. 49, so as to come within the Winding-up Act, 1856. He was never entered on the list of shareholders under that act, but had received dividends, and after his death his executors received dividends and then sold the shares. Held, that as he would have been

a contributory under the old acts, so, following *Luard's Case*, his executors were now contributories.

[*Re Northumberland and Durham District Banking Company, Ex parte Dixon's Executors*]. . . 225

2. The Court in directing a compromise under the 19th section of the 21 & 22 Vict. c. 60, exercises a judicial discretion, and will not direct the official liquidators to enter into a compromise without having the means of itself forming an opinion as to the propriety of the compromise. Therefore, where official liquidators applied to the Court to direct a compromise which had been proposed by a body of thirty-five shareholders in a company which was being wound up, to pay among them an aggregate sum in discharge of their liabilities as shareholders, but without disclosing to the Court the particulars or data of such compromise, the Court refused the application. It is in the discretion of the Court whether notice shall be given to creditors under the 19th section of the 21 & 22 Vict. c. 60. [*In re Northumberland and Durham District Banking Company, Ex parte Totty*]. . . 273

3. The 33rd section of the Winding-up Act of 1849 (12 & 13 Vict. c. 108), limiting a period of three weeks within which re-hearings are to be moved for, applies only to proceedings under a winding-up order, and not to the re-hearing of the winding-up order itself. An order concurred in for a voluntary winding-up under the Winding-up Acts of 1856 and 1857 is not binding as a consent order upon contributories who were not parties to such order. [*In re Anglo-Californian Gold Mining Company*]

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WRIT OF ASSISTANCE.

The Court of Chancery exercises a discretion in permitting actions at law to proceed, but it will never permit its decisions to be questioned in a Court of Law. Therefore, where an action of trover was brought against a sheriff for an ejectment under a writ of assist-

ance, issued in pursuance of an order of the Court, an injunction was granted restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order. [*Walker v. Micklethwait*] . . . . . 49

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